TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 1911

A. STRAUS, APPELLANT,

vs.

W. L. FOXWORTH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED FEBRUARY 15, 1912.

(23,059)

(23,059)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 983.

A. STRAUS, APPELLANT,

vs.

W. L. FOXWORTH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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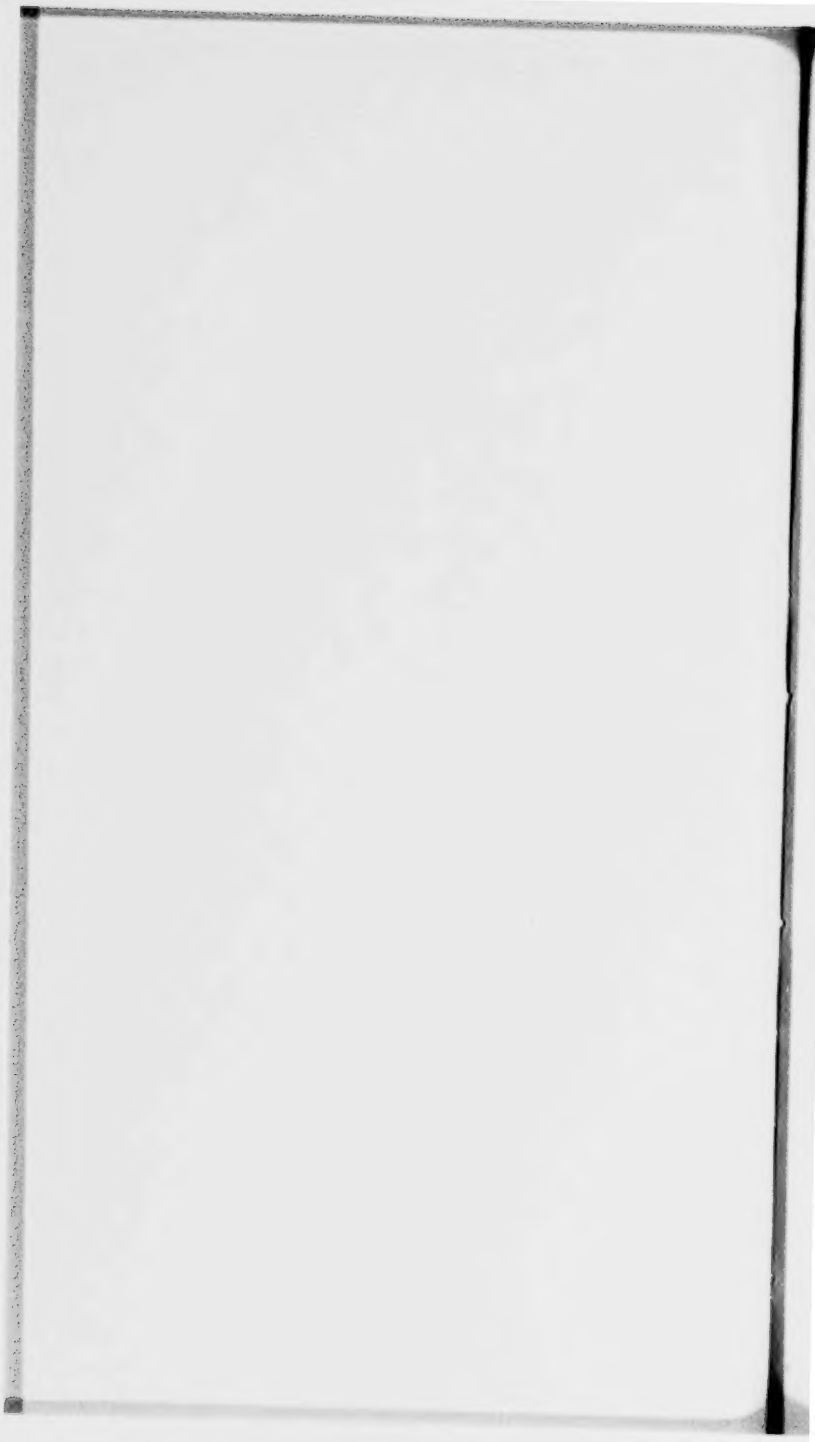

a In the Supreme Court of the United States, October Term, A. D. 1911.

No. —.

A. STRAUSS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from Supreme Court, Territory of New Mexico.

Transcript of Record.

1 Be it Remembered, that heretofore, on to-wit, *on* the 14th day of February, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending entitled, A. Straus, Appellant, vs. W. L. Foxworth, Appellee, which said transcript was in the following words and figures, to-wit:

2 Be it remembered, that on, to-wit, the 10th day of May, A. D. 1910, there was filed in the office of the Clerk of the District Court for the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay, a bill of complaint, which said Complaint is in words and figures as follows, to wit:

Complaint.

In the District Court of the Sixth Judicial District, Setting within and for the County of Quay, Territory of New Mexico.

No. 724.

A. STRAUSS, Plaintiff,
vs.
W. L. FOXWORTH, Defendant.

First Cause of Action.

Plaintiff for his first cause of action states:

1. That he is the owner in fee simple of the following described land and premises, to-wit: The E. ½ of the N. W. ¼ of Sec. 20, Township 6 N. R. 27 E., N. M. P. M., and the S. E. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of Sec. 5 T. 5 N. R. 27 E., N. M. P. M. and the E. ½ of the S. W. ¼ of Section 5, Township 5 N. R. 27 E. N. M. P. M., all situate in the County of Quay, Territory of New Mexico.

2. Plaintiff avers that he is credibly informed and verily believes

that the defendant makes some claim adverse to the estate of plaintiff.

Wherefore, Plaintiff prays for a decree of this court for the establishment of the plaintiff's estate against such adverse claims of the defendant, and that the defendant be barred a*b*d forever estopped from having or claiming any right or title to the premises adverse to the plaintiff, and that plaintiff's title be forever quieted and set at rest, and for costs of this action.

3 Second Cause of Action.

Plaintiff for his third cause of action states:

1. That he is the owner in fee simple of the following described land, to-wit: The E. ½ of the N. W. ¼ of Section 20, Twp. 6 N. R. 27 E., N. M. P. M., situate in the County of Quay, and Territory of New Mexico.

2. Plaintiff is informed and believes that defendant claims title thereto under and by virtue of an alleged delinquent tax sale of said land attempted to be made on the 5th day of March, A. D. 1906; that the said alleged sale is illegal, unlawful and void for the reasons that:

(*a*) Such sale was not sufficiently advertised for four consecutive weeks prior to the return date of such sale.

(*b*) That the printer who published the delinquent tax list upon which such sale was based did not immediately after the last publication thereof transmit to the collector of the said County of Quay an affidavit or proof of such publication by any person to whom the fact of such publicatio*b* was known substantially in the form prescribed by statute or any other form.

(*c*) That the collector of the said County of Quay did not make, nor cause to be made, an affidavit of posting such delinquent tax sale or notice as required by statute and did not cause an affidavit of the publisher of such list or the affidavit of posting such list to be deposited with the Probate Clerk of said County.

(*d*) That the Probate Clerk of said County did not carefully preserve such affidavits or any affidavits or proof of such publication and posting such list as required by statute.

(*e*) That at the alleged sale aforementioned it was attempted to sell said land for taxes alleged to be delinquent for the year 1904; that the amount of said delinquency alleged to be due against said land for taxes for said year and for which said land was attempted to be sold was $2.68, whereas the sum levied and assessed against the said land was in fact $2.52.

3. That subsequent to the attempted sale of said land as hereinbefore stated, the said treasurer and collector of said County
4 of Quay made out to the County of Quay an alleged tax certificate, being numbered 66; that thereafter said tax certificate was taken up by said W. L. Foxworth and thereafter upon his demand, an alleged tax or quit claim deed made and executed by said treasurer and collector was issued to said W. L. Foxworth which said deed is of record in Book 7 of Warranty Deeds at pages 622 to 624 inclusive.

4. That the said mentioned deed is the only muniment of title which defendant has of claims to have to said lands, and that said deed being of record as aforesaid is a cloud upon plaintiff's title to said land.

Wherefore, Plaintiff demands judgment that said deeds be cancelled and stricken from record in the office of the Probate Clerk and ex-officio Recorder of the said County of Quay, and that plaintiff's title be quieted and forever set at rest as against defendant W. L. Foxworth and for costs of this action.

Third Cause of Action.

Plaintiff for his fourth cause of action states:

1. That he is the owner in fee simple of the S. E. ¼ of the N. W. ¼ and the E. ½ of the S. W. ¼ of Section 5, Township 5 N. R. 27 E., N. M. P. M. situate in the County of Quay and Territory of New Mexico.

2. Plaintiff is informed and believes that defendant claims title thereto under and by virtue of an alleged delinquent tax sale of said land attempted to be made on the 5th day of March, A. D. 1906; that the said alleged sale is illegal, unlawful and void for the reasons that;

(*a*) Such sale was not sufficiently advertised for four consecutive weeks prior to the return date of such sale;

(*b*) That the printer who published the delinquent tax list upon which sale was based did not immediately after the last publication thereof transmit to the collector of the said County of Quay an affidavit or proof of such publication by any person to whom the fact of such publication was known substantially in the form prescribed by statute or any other form.

(*c*) That the collector of the said County of Quay did not make, nor cause to be made, an affidavit of posting such delinquent tax sale or notice as required by statute and did not cause an affidavit of the publisher of such list or the affidavit of posting such list to be deposited with the Probate Clerk of said county.

(*d*) That the Probate Clerk of said county did not carefully preserve such affidavits or any affidavits or proof of such publication and posting such lists as required by statute.

(*e*) That at the alleged sale aforementioned it was attempted to sell said land for taxes alleged to be delinquent for the years 1903 and 1904; that the sum alleged to be due against said land for taxes for the year 1904 and for which said land was attempted to be sold was $4.02, whereas the sum levied and assessed against the said land was in fact but $3.78.

3. That subsequent to the attempted sale of said land as hereinbefore stated, the said treasurer and collector of said County of Quay made out to the County of Quay an alleged tax certificate, being numbered 37; that thereafter said tax certificate was taken up by said W. L. Foxworth and thereafter upon his demand, an alleged tax or quit claim deed made and executed by said treasurer and collector was issued to said W. L. Foxworth which said deed is of record in Book 7 of Warranty Deeds at pages 627 to 629 inclusive.

4. That said mentioned deed is the only muniment of title which said defendant has or claims to said land; that said deed being of record as aforesaid of the office of the Probate Clerk and ex-officio Recorder of Quay County is a cloud upon plaintiff's title to said land.

Wherefore, Plaintiff demands judgment that said deed be cancelled and stricken from the records by the Probate Clerk and ex-officio Recorder of the County of Quay, and that plaintiff's title be quieted and forever set at rest as against the defendant W. L. Foxworth, and for costs of this action.

Fourth Cause of Action.

Plaintiff for his fifth cause of action states:

1. That he is the owner in fee simple of the following described land, to-wit: The S. W. ¼ of the S. E. ¼ of Section 5, Twp. 5 N. R. 27 E., N. M. P. M., situate in the County of Quay and Territory of New Mexico.

2. Plaintiff is informed and believes that defendant claims title thereto under and by virtue of an alleged delinquent tax sale of said land attempted to be made on the 15th day of December
6 A. D. 1906; that the said alleged sale is illegal, unlawful and void for the reasons that;

(*a*) Such sale was not sufficiently advertised for four consecutive weeks prior to the return date of such sale;

(*b*) That the printer who published the delinquent tax list upon which such sale was based did not immediately after the last publication thereof transmit to the collector of the said County of Quay an affidavit of proof of such publication by any person to whom the fact of such publication was known substantially in the form prescribed or any other form.

(*c*) That the col-ector of the said County of Quay did not make, nor cause to be made an affidavit of posting such delinquent tax sale or notice as required by statute and did not cause an affidavit of the publisher of such list or the affidavit of posting such list to be deposited with the Probate Clerk of said County.

(*d*) That the Probate Clerk of said County did not carefully preserve such affidavits or proof of such publication and posting such list as required by statute.

3. Subsequent to the attempted sale of said land as hereinbefore stated said treasurer and collector of Quay County made out to the County of Quay an alleged tax certificate numbered 78; that thereafter said tax certificate was taken up by said W. L. Foxworth and thereafter upon his demand an alleged tax or quit claim deed was made and executed on the 6th day of April, 1910 by the treasurer and ex officio collector of the County of Quay to the said W. L. Foxworth, which said deed as plaintiff is informed and believes is now of record in the office of the Probate Clerk and ex officio Recorder of the said County of Quay.

4. That said mentioned deed is the only muniment of title which said defendant has or claims to have to said land, and the said deed being of record in the office of the Probate Clerk and Ex-officio Re-

corder of said Quay County is a cloud upon plaintiff's title to said land.

Wherefore, Plaintiff demands judgment that said deeds be cancelled and stricken of record of the Probate Clerk and ex officio Recorders, and that the plaintiff's title be quited and forever
7 set at rest as against the said defendant, W. L. Foxworth, and for costs of this action.

REID & HERVEY,
Attorneys for Plaintiff, Roswell, New Mexico.

Endorsed: No. 724. In the District Court of the Sixth Judicial District, setting within and for the County of Quay, Territory of New Mexico. A. Strauss, Plaintiff, vs. W. L. Foxworth, Defendant. Complaint. Filed in my office this 10 day of May, 1910. Chas. P. Downs, Clerk. By Frida M. Ackman, Deputy. Reid & Hervey, Attoeney- for Plaintiff, Roswell, New Mexico.

8 And thereafter on to-wit, the 26th day of July, A. D. 1910, there was filed in the office of the Clerk of the Sixth Judicial District of the Territory of New Mexico, within and for the County of Quay, a Demurrer, which said Demurrer is in words and figures, as follows, to-wit:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUSS, Plaintiff,
vs.
W. L. FOXWORTH, Defendant.

Demurrer.

Comes now the defendant, W. L. Foxworth, by his attorneys Reed Holloman and Harry H. McElroy, and demurs to the complaint of the plaintiff, filed herein, and for grounds for demurrer says:

1. That the complaint of the plaintiff is insufficient in this, to wit, that said complaint does not set up facts sufficient to constitute a cause of action.

And the defendant especially demurring to plaintiff's second, third and fourth counts of said complaint, for grounds of demurrer, says:

That in and by said counts, plaintiff makes collateral impeachment of certain tax sales, tax sale certificates, and tax deeds, in said complaint mentioned and described, and that the same are insufficient in this, to wit, that plaintiff does not set up either of the grounds allowed by statute for the collateral impeachment of such tax title, to wit, either that taxes had been paid at the time of such sales, or that the real estate was not liable to the tax or assessment, and that the grounds set up by plaintiff in such attempted collateral

impeachment of such tax titles are insufficient for the reason that the statute declares that such certificate of tax sale shall be conclusive evidence of their regularity and validity, in all collateral proceedings, except in cases where taxes had been paid, or the real estate was not liable to the tax assessment.

9 2. That plaintiff's complaint contains no allegation that the plaintiff ever returned the real estate in question for taxation, or that he ever offered to pay the taxes thereon, or that plaintiff has exercised the least degree of diligence in the payment of the taxes due on said lands, at the time of such sale, or since said time, or that he has offered to, or redeemed the same within the time allowed by law.

3. That plaintiff is seeking to have title of defendant in and to said lands declared null and void, and to vitiate and nullify the tax lien in which defendant's said tax title had its inception, and that plaintiff's grounds for such relief is insufficient in this that plaintiff does not allege that he has made or makes offer of payment of the amount of taxes paid by purchaser, in satisfaction of delinquency of plaintiff or of the person or persons with whom he is in privity at such sales.

Wherefore, defendant prays that he be not required to further answer herein, and for his costs in this behalf expended.

(Signed) HARRY H. McELROY,
Attorney for Defendant.

REED HOLLOMAN,
HARRY H. McELROY,
Attorneys for Defendant, Tucumcari, New Mexico.

And then, towit, on the 27th day of September, 1910, there was filed the order sustaining demurrer and entered of record by the aforesaid Clerk. This order is in words and figures as follows, towit:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

724.

A. STRAUS
v.
W. L. FOXWORTH.

Order Sustaining Demurrer.

This cause coming on for hearing upon the demurrer of defendant filed herein and after hearing counsel and being fully advised in the premises, the Court sustains the said demurrer as to the first ground of demurrer therein set forth in paragraph one of said demurrer and overrules the same as to all other matters and things.

10 The plaintiff is given twenty days from date hereof to amend his complaint, to all of which rulings of the Court both plaintiff and defendant except.

Signed and dated in Chambers this 27th day of September, A. D. 1910.

(Signed) E. R. WRIGHT, *Judge.*

And then herein, towit, on the 30th day of December, 1910, the same being the 22d day of the Special December 1910 Term of the District Court of the Sixth Judicial District of the Territory of New Mexico, within and for the County of Quay, there was filed and entered of record the judgment, which said judgment is in words and figures as follows, towit:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Judgment.

This cause coming on to be heard on the motion of defendant's attorney, Harry H. McElroy, in open court on this 30th day of December, A. D. 1910, for judgment by default, and it appearing to the Court that the demurrer of defendant to complaint heretofore filed herein was sustained on the 27th day of September, A. D. 1910, and that plaintiff was given twenty days from the date thereof to amend his complaint, and it appearing to the Court that plaintiff has failed to enter his further plea herein, and this cause having come on for hearing on the above date, and the plaintiff failing to appear and prosecute said action, and the court being fully advised in the premises,

It is therefore, by the Court ordered, adjudged and decreed that this cause be and the same hereby is dismissed.

It is further ordered and adjudged that the defendant, W. L. Foxworth have and recover of and from said plaintiff, A. Straus, all his costs in this behalf expended.

Done in open court on this 30th day of December, 1910.

(Signed) EDWARD R. WRIGHT, *Judge.*

11 And then herein, towit, on the 11th day of January, A. D. 1911, the motion for appeal was filed by the Clerk of this Court, which said motion is in words and figures as follows:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Motion for Appeal.

Plaintiff, by his attorneys, moves the Court to grant him an appeal to the Supreme Court of the Territory of New Mexico, from the final judgment of the District Court of Quay County, in this cause.

(Signed) REID & HERVEY,
Attorneys for Plaintiff.

And then, herein, towit, on the 19th day of January, A. D. 1911, the order for appeal was filed and entered of record by the aforesaid Clerk, which said order is in words and figures as follows:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Order Allowing Appeal.

This cause coming on to be heard upon the motion heretofore filed herein for an appeal to the Supreme Court of the Territory;

It is ordered by the Court that an appeal from the final judgment of the District Court of the County of Quay herein be and the same is allowed to the Supreme Court of the Territory of New Mexico. Amount of bond for supersedeas is fixed at 2500.00 Dollars.

Dated this 19th day of January, 1911.

(Signed) E. R. WRIGHT, *Judge.*

And then herein, towit, on the 23d day of January, A. D. 1911, there was filed by the Clerk the citation on appeal, which said citation is in words and figures as follows:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Citation on Appeal.

12 To W. L. Foxworth, Defendant, and Reed Holloman and Harry H. McElroy, Attorneys for Defendant, Greeting:

You are hereby notified that the plaintiff in the entitled cause has taken an appeal to the Supreme Court of the Territory of New Mexico, from the final judgment therein, rendered in the District Court of the County of Quay and Sixth Judicial District of New Mexico.

And you are hereby directed to appear in said Supreme Court and answer such appeal on the return day thereof.

[SEAL.] (Signed) CHAS. P. DOWNS,
Clerk District Court, Quay County.

TERRITORY OF NEW MEXICO,
County of Quay:

I, J. F. Ward, Sheriff of Quay County, Territory of New Mexico, do hereby certify that the within writ of citation on appeal came to my hands on the 19th day of January, 1911, and that I made service thereof by delivering a true copy thereof to Harry H. McElroy, Attorney of Record of the defendant, W. L. Foxworth, at the County of Quay and Territory of New Mexico, on the 20th day of January, 1911.

(Signed) J. F. WARD,
Sheriff Quay County.

Fees.

Service $1.50

And then, herein towit, on the 1st day of February, 1911, there was filed the appeal bond, which said appeal bond reads as follows:

In the Supreme Court of the Territory of New Mexico.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Supersedeas Bond on Appeal.

Whereas, the above named appellant has taken an appeal from the judgment of the District Court of Quay County in cause numbered

on the civil docket of said County, 724, being the case of A. Straus, plaintiff, versus W. L. Foxworth, defendant, wherein judgment in said district court was rendered for defendant on the 30th day of December, 1911, and;

Whereas, the Court has by order, fixed the bond for supersedeas at the sum of $2500.00.

Now therefore we, A. Straus, as principal, and Lilian Colman Russell of East Las Vegas, New Mexico, and Simon Bacharach of
13 East Las Vegas, New Mexico, as sureties, are held and firmly bound unto W. L. Foxworth, in the sum of Two Thousand Five Hundred Dollars ($2500) legal money of the United States to be paid to said W. L. Foxworth, or his heirs, executors and administrators to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our heirs, executors and administrators, firmly by these presents.

Witness our hands this 25 day of Jan'y, 1911.

The conditions of this obligation are such that if A. Straus, the appellant, shall prosecute the appeal herein mentioned with due diligence in the Supreme Court, and such other Court as the said cause may be appealed to and if the decision of the court below, towit, the District Court for the County of Quay, be affirmed or the appeal be dismissed he will comply with the decree of the District Court therein and pay all damages and costs adjudged against him in the District Court and that may be adjudged against him in the said Supreme Court on such appeal.

(Signed) A. STRAUS.
" LILIAN COLMAN RUSSELL.
" SIMON BACHARACH.

TERRITORY OF NEW MEXICO,
County of San Miguel:

On this 28th day of Jan'y, 1911, personally appeared before me, the undersigned, a notary public in and for the County of San Miguel, and Territory of New Mexico, Lilian Colman Russell and Simon Bacharach who are respectively known to me to be the persons who executed the foregoing bond, and they respectively acknowledged that they executed the same as their free act and deed and each of the said sureties being duly sworn, say, each for himself that he is worth the sum of $2500.00 over and above his just debts and liabilities and exemptions.

[SEAL.] (Signed) WM. G. HAYDON,
Notary Public.

My commission expires Jan. 15th, 1913.

The above and foregoing bond is hereby approved as to form and sufficiency of sureties this 1st day of Feb., 1911.

(Signed) CHAS. P. DOWNS,
By HERB R. WRIGHT, *Deputy.*

14 TERRITORY OF NEW MEXICO,
County of Curry:

On this 25th day of January, 1911, personally appeared before me, the undersigned, a notary public in and for the County of Curry and Territory of New Mexico, A. Straus, to me personally known and known to be the person who executed the foregoing bond and acknowledged that he executed the same as his free act and deed.

In witness whereof I have hereunto set my hand and official seal the day and the year in this certificate first above written.

[SEAL.] (Signed) C. A. SCHEURICH,
Notary Public, Curry County.

My commission expires on the 25th day of Jan., 1911.

And then herein, towit, on the 26th day of Jan'y, A. D. 1911, there was filed by the aforesaid Clerk the præcipe, which said præcipe is in words and figures as follows:

In the District Court of the Sixth Judicial District of the Territory of New Mexico within and for the County of Quay.

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Præcipe.

The Clerk of the District Court for Quay County will please make up one copy of the record proper for the appeal in the above entitled cause and incorporate therein the following:

This præcipe.
The complaint.
Demurrer of defendant.
Order sustaining demurrer.
Judgment for defendant.
Motion for appeal.
Order allowing appeal.
Citation on appeal and return of service.
Appeal bond. Certificate of clerk as to costs.
All other orders or entries made in this cause.

Yours truly,
(Signed) REID & HERVEY,
For Plaintiff.

15 *Cost Bill.*

No. 724.

A. STRAUS
v.
W. L. FOXWORTH.

Amount due Clerk	$9.70
Amount due Sheriff	1.50
Amount due for Transcript	9.50
	$20.70
Credit Clerk	$5.00
Balance due	$15.70

I hereby certify that the foregoing is a correct statement of the costs in the above entitled cause, and that the plaintiff is liable therefor.

Witness my hand and the Court's seal this 6th day of February, A. D. 1911.

CHAS. P. DOWNS, *Clerk*,
By DRISA M. ECKMAN, *Deputy*.

16 And for as much as the matters and things herein set out are not of record in said cause, and the said Plaintiff has prayed that the foregoing matters and things be made a part of this Bill of Exceptions in this cause, in order that they may become a part of the record herein, this said Bill of Exceptions is hereby allowed and signed, sealed and enrolled and made a part of the record in said cause this 8th day of February, A. D. 1911.

(Signed) EDWARD R. WRIGHT,
Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Sixth Judicial District Court Thereof.

TERRITORY OF NEW MEXICO,
County of Otero, ss:

I, Chas. P. Downs, Clerk of the District Court of the Sixth Judicial District of the Territory of New Mexico, do hereby certify the above and foregoing as a true and complete transcript of the record and proceedings had in the cause lately pending in said Court for the County of Quay wherein A. Straus was plaintiff and W. L. Foxworth was defendant, as same appears of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, on this 8th day of Feb'y, A. D. 1911.

CHAS. P. DOWNS,
Clerk of the District Court.

17 And Afterwards, *on* to-wit, on the 14th day of February, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a stipulation by counsel, which said stipulation was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Stipulation.

It is hereby stipulated and agreed, by the respective parties hereto, by their respective attorneys, that the transcript of record assignments of error and briefs in support thereof, shall be served upon the attorneys for the appellee, and upon Davidson and Keator, whom it is further agreed may enter their appearance herein for the appellee and file separate briefs, if they desire, for said appellee, within fifteen days from this date. It is further agreed that the attorneys for appellee, and the said Davidson and Keator, if they desire, shall serve the attorneys for appellant with a reply brief within ten days from the date of the receipt of the briefs of appellant, and that this cause shall be submitted to the Supreme Court without delay.

Dated this 2nd day of February, 1910.

(Signed) REID & HERVEY.
Attorneys for Appellant.
(Signed) HOLLOMAN & McELROY,
HARRY H. McELROY,
Attorneys for Appellee.

18 DAVIDSON & KEATOR.
By M. B. KEATOR.

And Afterwards, *on* to-wit, on the 28th day of February, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a stipulation by counsel, which said stipulation was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1380.

A. STRAUS, Appellant,
v.
W. L. FOXWORTH, Appellee.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that this case may be heard on

Wednesday, March 1st, or as soon thereafter as the Supreme Court can conveniently hear the same.

(Signed) REID & HERVEY,
Attorneys for Appellant.

(Signed) HARRY H. McELROY,
REED HOLLOMAN,

(Signed) C. C. DAVIDSON,
H. M. DOUGHERTY,
Per McE.,
Attorneys for Appellee.

19 And Afterwards, *on* to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, 1911, on the 17th day thereof, the same being the 1st day of March, A. D. 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1380.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from District Court, Quay County.

This cause coming on to be heard *by* the transcript of record, assignment of errors and briefs of counsel, is submitted to the court on briefs and the court not being sufficiently advised in the premises, takes same under advisement.

And Afterwards, *on* to-wit, on the 23rd day of the said regular term, the same being Wednesday August 16, 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1380.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from District Court, Quay County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by W. E.
20 Reid for appellant and H. M. Dougherty and R. P. Barnes for appellant and submitted to the court, and the court not being sufficiently advised in the premises takes the same under advisement.

And Afterwards, *on* to-wit, on the 34th day of said regular term, the same being Friday September 1, 1911, the following among other proceedings were had and entered of record, to-wit:

No. 1380.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from District Court, Quay County.

This cause having been argued by counsel, submitted to the court and taken under advisement by the court upon a former day of the present term and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Abbott, Chief Justice Pope and Associate Justices McFie, Parker and Roberts, concurring, affirm the judgment of the court below for reasons stated in the opinion of the court on file.

It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Quay, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith it is considered and adjudged by the court that this cause be and the same is hereby dismissed.

It is further ordered and adjudged that the appellee, W. L. Foxworth do have and recover of the appellant, A. Straus, his
21 costs in this behalf expended, for which let execution issue.

And Afterwards, *on* to-wit, on the forty-fifth day of the said regular term, the same being the 19th day of December, A. D. 1911, the following amongst other proceedings were had and entered of record as follows, to-wit:

No. 1380

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from District Court, Quay County.

Now comes W. E. Reid, Esq., attorney for appellant herein, and moves the court here to grant an appeal from the judgment and decree of this court to the Supreme Court of the United States, and the court being sufficiently advised in the premises grants the same.

It is therefore considered and adjudged by the court that the appellant herein do have, and hereby is granted an appeal from the judgment and decree of this court to the Supreme Court of the United States.

And Afterwards, *on* to-wit, on the 19th day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on the appeal to the Supreme Court of the United States, which said assignment of errors was and is in the following words and figures, to-wit:

22 Supreme Court of the Territory of New Mexico.

No. 1380.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

On Appeal from the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States.

Assignment of Errors.

Now comes the appellant, A. Straus, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the Territory of New Mexico in the above entitled matter there is manifest error in this: to wit,

First. The Court erred in holding and deciding that the provisions of Chapter 22 of the Acts of the Legislative Assembly for the Territory of New Mexico for the year 1899, are not in conflict with and in violation of the provisions of the 14th amendment of the Constitution of the United States, for that the Territory of New Mexico, by and through the provisions of said Chapter 22 assumes and seeks to give the appellant and other citizens of the United States of property without due process of law.

Second. The Court erred in sustaining the demurrer to the complaint as shown by the first ground set out in said demurrer in paragraph One.

Third. The Court erred in holding and deciding that the words "sold at tax sale in accordance with this act," as found in
23 Section 25 of Chapter 22, Laws of New Mexico, 1899, did not mean that the mandatory provisions of said act were to be followed, but meant no more than a reference to sales under said act as distinguished from sales under some other act.

Fourth. The Court has erred in holding and deciding that the allegation in paragraph 2c of the complaint "that the sum alleged to be due against said land for taxes for the year 1904 and for which the land was attempted to be sold was $4.02; whereas the sum levied and assessed against the said land was in fact $3.78", meant that there were costs sufficient to cover the difference, and in so holding, considered this fact proven by statement of counsel, the matter before the Court being a demurrer.

Fifth. The Court erred in holding and deciding that the provisions of Section 31 of Chapter 22 of the Laws of New Mexico of 1899, as to the date of sale are not mandatory, and that a certificate of sale

attempted to be made under said section, though none of the provisions thereof was followed, has the same force and effect as certificates issued in sales on judgments and executions.

Wherefore, Appellant prays that this cause may be reversed and that judgment be entered in favor of Appellant who was plaintiff below, and such further relief as may be proper and just.

(Signed) WILLIAM C. REID,
JAMES M. HERVEY,
Attorneys for Appellant, Roswell, New Mex.

And Afterwards, *on* to-wit, on the 26th day of December,
24 A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit of value in the above entitled cause, which said affidavit of value was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1380.

A. STRAUS, Appellant,
vs.
W. F. FOXWORTH, Appellee.

Affidavit of Amount Involved in this Suit.

I, A. Straus, being first duly sworn, upon my oath state that I am appellant in the above entitled cause: that I have taken an appeal in said cause from the judgment of the Supreme Court of the Territory of New Mexico to the Supreme Court of the United States; that I am informed as to the value of the property involved in this suit and that on my best information and belief the said property is of a value greater than the sum of five thousand dollars ($5000.).

(Signed) A. STRAUS.

Subscribed and sworn to before me this 22 day of December, A. D. 1911.

[NOTARIAL SEAL.] WM. G. HAYDEN,
Notary Public, East Las Vegas, N. M.

My commission expires Jan. 15, 1913.

25 And Heretofore, *on* to-wit, on the 1st day of September, A. D. 1911, there was filed in the office of the Clerk of Supreme Court of the Territory of New Mexico, an opinion by the Court in the above entitled cause, which said opinion was and is in the following words and figures, to-wit:

26 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1380.

A. STRAUS, Appellant,
vs.
W. L. FOXWORTH, Appellee.

Appeal from District Court, Quay County.

Syllabus.

A tax certificate issued under Section 31, Ch. 22, of the Acts of 1899, providing for the sale without a judgment of court, of property for delinquent taxes for amounts less than twenty-five dollars, vests a title in the purchaser which can be invalidated only on the grounds that the taxes, penalties interest and costs had been paid before the sale, or that the property was not subject to tax, and not for irregularities in the proceedings leading up to the sale unless they are fraudulent or amount to jurisdictional defects.

Statement of the Case.

The plaintiff was the owner of certain land in Quay County, title to which the defendant claimed to have obtained through certain tax certificates, followed by a tax deed, all given by the Treasurer of said county. This action was brought by the plaintiff against the defendant to remove the cloud on his title created by said tax deed. In his complaint he set up certain irregularities in the proceedings on which the sale for delinquent taxes, made March 5th, 1906, was based, alleging failure to comply with provisions of law bearing on the question of notice as to all but one, which was the sale of the land for the amount claimed to be due of $4.02, whereas the actual amount levied was $3.78.

To the complaint the defendant demurred, alleging that the statutes of New Mexico do not permit a title acquired through a tax certificate issued under Section 31, Ch. 22, Laws of 1899, to be
27 attacked or invalidated except on the ground that the taxes, penalties and interest and costs had been paid before the sale, or that the property was not subject to the assessment, and that neither of these two grounds was set up in the plaintiff's complaint.

The demurrer was sustained, the plaintiff elected to stand on his complaint and a judgment of dismissal was entered, from which the plaintiff appealed to this court.

The provisions of law which the appellee claims have the effect of limiting the right to attack tax titles, as above stated, are found in Section 25 of the Act above named construed in connection with other sections referred to in the opinion. Setcion 25 is as follows:

"It is hereby made the duty of every person, firm or corporation, owning or having any interest, legal or equitable, in any real estate or other property, in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the *the* assessment roll and delinquent tax list for any year by such *discription* as will serve to identify the same, the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and costs, had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal sub-division of real estate, be sold as hereinbefore provided, upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such por-
28 tion of said tract or subdivision upon which the taxes had not been paid."

Opinion of the Court.

ABBOTT, *A. J.:*

Counsel for the appellant claim, in the first place, that Section 25 above quoted should be restricted in its application to errors and irregularities in listing property for taxation, and was not meant to apply to defects in the assessment, adverti-sement and sale of land for taxes. The fact that immediately before the words which specifically limit the right of attack, there is a limitation of the effect of irregularities in listing, does not, we think, have the effect claimed for it by the appellant. The argument for the opposite effect would be a stronger, so far as listing was concerned, it was not to be expected that anything more would be said. The statement on that subject was complete. Besides, the act in question is evidently meant to contain a system of taxation practically complete in istelf.

The Act consists of thirty-four sections, and, while it leaves some portions of the legislation previously in existence unrepealed unless they are in conflict with chapter 22, the reason for so doing is manifest from the proviso in Sec. 34:

"All acts or parts of acts in conflict herewith, either general or special, are hereby repealed, and this act shall take effect and be in force from and after its passage: Provided, That the provisions of this act shall not affect or be applicable to taxes heretofore assessed or which are delinquent at the date of the approval hereof, except, that suit for the same may be brought and judgment thereon rendered in the manner provided by this act, but the validity of such delinquent taxes shall be determined by the law in force at the time of making the assessment therefor. The time for the payment of

all taxes now delinquent is hereby extended until May 1, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation shall be determined."

29 In view, then, of the comprehensive purpose of the act, of which the language last quoted leaves no doubt, it would be a forced construction which should narrow the application of Sec. 25 to errors in listing, leaving the much larger field of irregularities in advertising, making sale, giving certificates of sale and tax deeds uncovered.

It is claimed too that even if the limitation on attack found in section 25 is not restricted to cases of error in listing, yet by the words "sold at tax sale in accordance with this act" it was meant to limit that restriction to those cases in which the provisions for advertisement and sale contained in the act should be strictly followed. We are satisfied, however, that it was meant by this provision to afford deliverance from the evil of having tax sales held invalid for irregularities which were not based on meritorious ground, an evil which as a matter of common knowledge had assumed such proportions not only in New Mexico, but throughout the country, as seriously to interfere with the fair adjustment of the burden of taxation. As pointed out by the Supreme Court of the United States in De Treville v. Smalls, 98 U. S. 517, Blackwell in his work on "Tax Titles" states that "of a thousand cases of tax sales in court not twenty have been sustained." That the purpose of the Act was what we have suggested is further indicated as it seems to us beyond question, by the repetition in the Act in various forms and connections of the declaration that a tax title shall be good against all but really meritorious objections. In the latter part of Sec. 23, it is provided that the judgment shall be "conclusive except in cases where the taxes had been paid or the real estate was not liable to the tax assessment." In Section 25, after the general statement already referred to, as if to make sure there should be no escape from it, there is a provision that if the taxes had been paid on a portion of land sold, nevertheless the sale and certificate shall vest a perfect title in the portion on which the "taxes had not been paid."

30 In Sec. 34 there are provisions for mitigating what might be considered the rigors of the act through leaving the validity of delinquent taxes to be determined by the law in force when the assessment was made, and by extending the time of payment of taxes then delinquent, or in litigation at the passage of the act. This measure of leniency toward defaults already made was superfluous, if no greater degree of strictness was to be exercised toward defaults of the future.

Bearing in mind the familiar rule of statutory construction which gives to the legislative intention controlling force, we are satisfied that the words "in accordance with this act"—not, it should be noticed, as having perhaps some significance—in accordance with the provisions of this act, mean no more than under or by authority of this act and that the intention was merely to limit the effect of Sec. 25 to cases coming under chapter 22 as distinguished from those to which the provisions of law left unrepealed by it might apply.

Still further, counsel for the appellant contends that one of his reasons stated falls within one of the grounds of attack permitted by the statute, Chap. 22, and that as the tax levied was $3.78 and the sale was for $4.02, the land was not subject to the tax for which the alleged sale was made. It is said in reply that the difference between the two sums named would be covered by the interest and expenses of sale which the law permits the county to add, and such, it seems clear must have been the case.

In 49 Mich. 272, Cooley, J., it was held "in the absence of a clear showing to the contrary, that the addition was lawfully made." But, even if it were not, to hold that such a trivial defect invalidated the appellee's title would be to return to the old way instead of following the new in conformity to the spirit and intention of the statute under consideration.

This brings us to the inquiry whether the legislature, having the will, had also the power to so limit the right of attack on a
31 tax title. It is not claimed for the appellee that such a statutory limitation would stand against fraud or lack of jurisdiction, but they do assert that the irregularities set up in the complaint do not go to the jurisdiction and there is no claim of fraud made. The irregularities alleged are plainly distinguishable from such as would defeat jurisdiction, as, for instance, that there was no tax levied, or attempted to be laid on the land in question. Assuming, then, that there is no jurisdictional defect in the case, we have to determine the question of absolute right involved.

It is settled that the owner of real estate on which a tax has been laid is not entitled, as a matter of right, to have it sold to satisfy the tax. It may be forfeited without a sale. King v. Mullens, 171 U. S. 404; King v. West Virginia, 216 U. S. 92; Fay v. Cozer, 217 U. S. 456; State vs. Sponaugle (W. Va.) 43 L. R. A. 727. And it has been held by the Supreme Court of the United States, whose decisions are controlling on this court, that when a sale to collect a delinquent tax is provided for by statute, it may also be provided that the title acquired by such sale shall not be invalidated for irregularities merely, but only on such substantial grounds as that the land was not subject to the tax, that the tax had been paid, or the land redeemed from the sale in the manner provided by law. De Treville v. Smalls 98 U. S. 517; Keeley v. Sanders 99 U. S. 441; Springer v. United States, 102 U. S. 586.

It is contended by the appellee that the Supreme Court has in Marx v. Hanthorn 148 U. S. 184, overruled the doctrine of the three cases last cited. We do not so understand that decision, but accept rather the view of it expressed by the same court in Castillo v. McConnico, 168 U. S. 684, wherein it is said:

"The case of Marx v. Hanthorn, 148 U. S. 172, in no way conflicts with the foregoing considerations. That case came to this court on appeal from a Circuit Court of the United States, and its decision involved ascertaining the meaning of the tax laws of the State as interpreted by the court of last resort thereof. In perform-
32 forming this duty, the court adopted and followed the construction given to the tax laws of the State by the Supreme Court of the State whence the case came.

It is also contended for the appellant that even if the certificate and deed given in pursuance of a judgment under Sec. 23, of Chap. 22, is protected from attack as in that section provided, yet the certificates and deed given without a judgment under Sec. 31, should not be held entitled to that protection. In terms the statute gives it the same standing that the certificate following a judgment has.

The reason for selling without judgment in any case in which the tax delinquent does not exceed $25, is doubtless that for so small a tax the costs of obtaining judgment would be disproportionate. Bearing in mind that, as we have seen, it is not essential that there should be a sale, by parity of reasoning there need be no judgment.

In reaching our conclusion we have not been unmindful of the hardship which may sometimes come upon owners of real estate through the enforcement of such a statute. But the course open to such an owner should, with a very moderate degree of care on his part, protect him from harm. He is presumed to know that his property has been taxed, and the time at which it becomes subject to tax. He has the right of appeal from the assessment to the County Board of Equalization, and from it to the Territorial Board. Even if the land is sold he has the right for three years to redeem it, by paying the tax, interest, etc.

The statute provides for similar publication of notice in each case and it can make no substantial difference to the party delinquent that on a tax of twenty-five dollars or more he is notified as one of a body of delinquents that at a certain time judgment will be rendered in court against the entire class, or that at a certain time and place his property will be sold for a delinquent tax.

33 Numerous decisions for and against the view we adopt are to be found in the exhaustive briefs submitted, but, as this decision must stand or fall with our interpretation of what the Supreme Court of the United States has said on the subject, we think it would be useless to go further into the examination of authorities here.

The judgment of the trial court if affirmed.

IRA A. ABBOTT,
Associate Justice.

We Concur:

WILLIAM H. POPE, *C. J.*
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
CLARENCE J. ROBERTS, *A. J.*

Mechem, A. J., having been of counsel in the court below, did not participate and Wright, J., having tried the case below did not participate.

34 STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing thirty-three (33) pages contain a full, true and complete transcript of the record

and proceedings, pleadings and opinion in the above entitled cause, which hereby is transmitted to the Supreme Court of the United States, in accordance with an appeal heretofore granted herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 11th day of January, A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court, State of N. M.

35 UNITED STATES OF AMERICA:

To W. L. Foxworth, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, wherein A. Straus, was appellant and you were appellee, to show cause, if any there be, why the judgment rendered against the said appellant as the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 2nd day of January, A. D., 1912.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM H. POPE,
Chief Justice Supreme Court of N. M.

I, H. M. Dougherty, do hereby certify that I am one of the attorneys of record for W. L. Foxworth, the appellee in the above styled cause; that a true copy of the above citations was served upon me at Socorro, New Mexico, on the 10th day of January, A. D. 1912.

H. M. DOUGHERTY,
Attorney for Appellee.

Endorsed on cover: File No. 23,059. New Mexico Territory Supreme Court. Term No. 983. A. Straus, appellant, vs. W. L. Foxworth. Filed February 15th, 1912. File No. 23,059.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~550.~~ 191

A. STRAUS, APPELLANT,

vs.

A. L. FOXWORTH.

AFFIDAVIT ON BEHALF OF APPELLANT ON MOTION OF APPELLEE TO LIMIT SCOPE OF APPEAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 550.

A. STRAUS, APPELLANT,

vs.

A. L. FOXWORTH.

AFFIDAVIT ON BEHALF OF APPELLANT ON MOTION OF APPELLEE TO LIMIT SCOPE OF APPEAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

AFFIDAVIT.

STATE OF TEXAS,
County of Potter, ss:

I, J. O. Curtis, being first duly sworn, upon my oath state: That I am acquainted with the following described land, to wit: The east half of the northwest quarter of section 20, township 6 north, range 27 east; the southeast quarter of the northwest quarter and the southwest quarter of the southeast quarter of section 5, township 5 north, range 27 east, and the east half of the southwest quarter of section 5, township 5

north, range 27 east, containing two hundred and forty (240) acres known as Ojo Coballo; that my acquaintance with this land comes about from having been president of the Horseshoe Land and Cattle Company, the former owner of these tracts of land for many years; that the intrinsic value of said tracts of land, separated from the ranch body, would perhaps not exceed $1,500 or $2,000. On account of the peculiar situation in almost the center of the ranch they control the free and open range for a scope of practically ten (10) miles square; that, considering the ranch as a whole, if these two tracts of land were taken from it, it would in my opinion decrease the value of the ranch six thousand ($6,000) dollars.

That under the laws of New Mexico, one cannot turn cattle loose on the open range, without having permanent water for such cattle; that these two tracts of land contain all the water obtainable within said scope of country of approximately ten (10) miles square, and the ownership of said tracts of land, together with the ownership of all the other water within said ranch limits, to wit, the limits of thirty (30) miles square, more or less, gives the owner the control of the grass of the range; that it is this fact which makes the value of said tracts of land great.

J. O. CURTIS.

Subscribed and sworn to before me this 16th day of August, 1912.

[Seal Notary Public, Potter County, Texas.]

F. W. POPHAM,
Notary Public, Potter County, Texas.

My commission expires the 1st day of June, 1913.

[Endorsed:] File No. 23,059 Supreme Court U. S., October term, 1912 Term No. 550. A. Straus, appellant, *vs.* W. L. Foxworth. Affidavit of J. O. Curtis, on behalf of appellant, on motion to limit scope of appeal. Filed Aug. 26th, 1912.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,
Appellant,

vs.

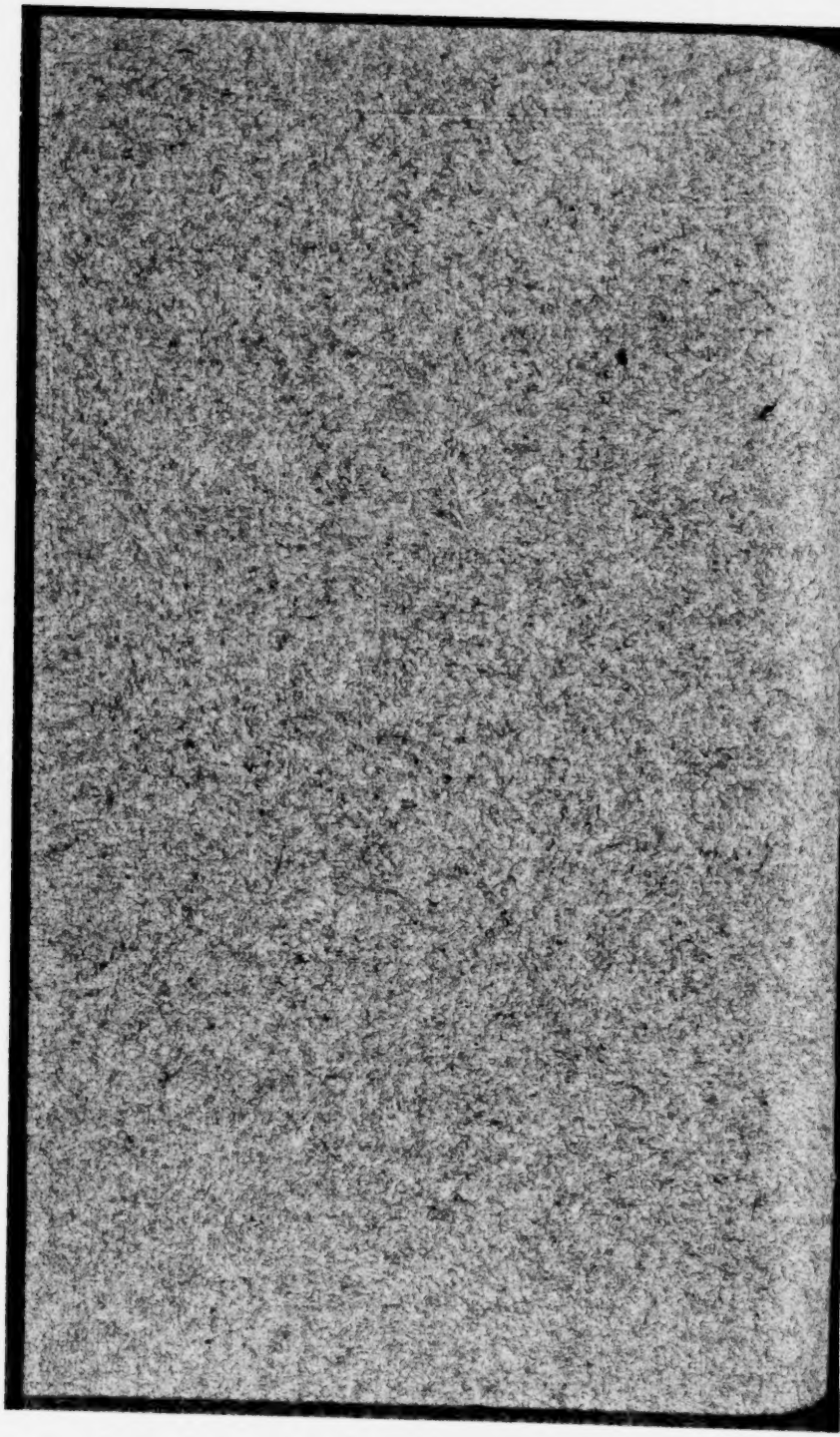
W. L. FOXWORTH,
Appellee.

No. 19

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

MOTION ON BEHALF OF APPELLEE TO LIMIT SCOPE OF APPEAL, WITH AFFIDAVITS SUPPORTING MOTION.

HARRY H. McELROY,
Attorney for Appellee.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,

Appellant,

vs.

W. L. FOXWORTH,

Appellee.

No. 550.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

MOTION ON BEHALF OF APPELLEE TO LIMIT SCOPE OF APPEAL, WITH AFFIDAVITS SUPPORTING MOTION.

Comes now the appellee, W. L. Foxworth, by his attorney of record herein, Harry H. McElroy, and moves the court to limit the appeal of said appellant herein to the one question raised by appellant in his first ground of error of appellant's assignment of errors filed herein, to-wit:

"That the court erred in holding and deciding that the provisions of Chapter 22 of the Acts of the Legislative Assembly for the Territory of New Mexico for the year 1899, are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the Territory of New Mexico, by and through the provisions of said Chapter 22 assumes and seeks to deprive the appellant and other citizens of the United States of property, without due process of law."

And appellee aforesaid moves the court that all other questions sought to be raised by said appeal and said assignments of errors, than the one stated, be dismissed, and that appellant be denied the review of said assignments of error, and that this appeal be dismissed as to all questions of error assigned, excepting the first assignment of error, stated.

And for his grounds for said motion, appellee says, and shows to the court by affidavits attached hereto:

1. That the property involved in this action is not of the value of five thousand dollars, and in fact is not worth to exceed fifteen hundred dollars.

2. That the value of the property involved in this action is not shown in the original record of the appeal to the Supreme Court of New Mexico, and was introduced into the record of this case by the affidavit of the appellant; that the question of value is one of fact upon which appellee ought to be entitled to be heard, and that appellee was given no notice of the filing of said affidavit, nor notice that the issue of value of said property was to be raised, and was given

no opportunity to deny the same in the Supreme Court of New Mexico, and had no opportunity of being heard in that court upon this issue, and that the record of this cause does not show service on appellee in the premises.

3. That the affidavit of appellant as to the value of said property is made upon information and belief; does not show grounds of such belief; is indefinite and uncertain; and the witness does not show himself qualified and no foundation is laid for his testimony as to the value of such property.

4. That appellee files herewith affidavits showing the value of said property, and stands ready and willing to prove the value thereof.

5. That, excepting the first assignment of error, the Supreme Court of the United States ought not to take jurisdiction of the issues raised unless the property involved is of the value of $5000, and that the other errors assigned do not raise questions subject to the review of this court.

HARRY H. MCELROY,
Attorney for Appellee.
Post Office: Tucumcari, New Mexico.

AFFIDAVIT.

The State of New Mexico, County of Quay.

Harry H. McElroy, being duly sworn, on his oath says that he is attorney for W. L. Foxworth, appellee in the case styled in the foregoing motion, and makes this affidavit in behalf of said appellee in support of the foregoing motion; that the value of the property involved in said cause was not shown in the original record of the same on appeal to the Supreme Court of New Mexico; that the only showing of value in said

cause was made by affidavit of appellant, A. Straus, dated the 22d day of December, A. D. 1911, some months after the hearing of said cause, the exact time being unknown to affiant, that this affiant was attorney for appellee in the court below, and that Reed Holloman, C. C. Davidson, and Dougherty & Griffin were associated with him; that no notice was given this affiant of the raising of the question of value, and that affiant is informed by the counsel associated with him in said cause that no such notice was given to them, and that affiant is informed and verily believes that appellee did not have notice of the raising of such issue, and that the record shows no proof or certification of such notice, and that appellee did not have an opportunity to be heard in the court below upon the issue of the value of the property involved herein.

HARRY H. MCELROY.

Subscribed and sworn to before me this the 30th day of March, A. D. 1912.

(Seal) SAMUEL H. MCELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

In the Supreme Court of the United States of America. October term, 1911. *A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No.* 983.

Ira J. Briscoe, County Assessor of Quay County, New Mexico, being duly sworn on his oath, says that he is the County Assessor of Quay County, New Mexico, that the assessed valuation of the lands described as follows, to-wit:

E. ½ of N. W. ¼, Sec. 20, Twp. 6 N., R. 27 E., and S. E. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼, Sec. 5, T. 5 N., R. 27 E., and E. ½ of S. W. ¼ of Sec. 5, T. 5 N., R. 27 E., N. M. P. M.,

all situated in Quay County, New Mexico, total of 240 acres, is as follows, to-wit:

Assessed valuation for 1910.....$300.00

Assessed valuation for 1911..... 460.00

That in my opinion the true market value of said lands at all times since May 1, 1910, is not to exceed $800.00.

IRA J. BRISCOE.

Subscribed and sworn to before me this the 28th day of February, A. D. 1912.

(Seal) SAMUEL H. McELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

In the Supreme Court of the United States of America. October term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

AFFIDAVIT OF AMOUNT INVOLVED IN THIS SUIT.

The State of New Mexico, County of Quay.

George Evans, being duly sworn, on his oath, says, that he is a resident of Quay County, New Mexico, and that for the past five years he has been engaged in the real estate business in said county, and engaged in the buying and selling of real estate and farm and grazing lands; that he is familiar with the values of all classes of lands and real estate in said county, and that he knows the location and general character of the following described lands, to-wit:

E. ½ of N. W. ¼ Sec. 20, Twp. 6 N., R. 27 E., and S. E. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼ of Sec. 5, T. 5 N., R. 27 E., and E. ½ of S. W. ¼ of Sec. 5, Twp. 5 N., R. 27 E., N. M. P. M.,

all situated in Quay County, New Mexico, a total of 240 acres.

That the reasonable market value of said lands is not to exceed the sum of $750.00.

GEORGE EVANS.

Subscribed and sworn to before me this the 10th day of February, A. D. 1912.

(Seal) SAMUEL H. McELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

The State of New Mexico, County of Quay.

In re value of lands in Quay County, New Mexico, described as follows, to-wit:

E. ½ of N. W. ¼, Sec. 20, T. 6 N., R. 27 E., N. M. P. M., S. E. of N. W. and S. W. of S. E. and E. ½ of S. W., Sec. 5, T. 5 N., R. 27 E., N. M. P. M., all lying and being in Quay County, New Mexico.

L. E. Sherwood, being duly sworn, on his oath says, that he is familiar with the values of lands in Quay County, New Mexico, and in a general way with the lands above described; that in his opinion the land above described is not worth to exceed the sum of $1,500; and that I have been engaged in a general real estate business in Quay County, N. M., for past five years.

L. E. SHERWOOD.

Subscribed and sworn to before me this the 10th day of January, A. D. 1912.

(Seal) SAMUEL H. McELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

In the Supreme Court of the United States of America. October term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

AFFIDAVIT OF AMOUNT INVOLVED IN THIS SUIT.

The State of New Mexico, County of Quay.

Harry H. McElroy, being duly sworn, on his oath says, that he is a resident of Quay County, New Mexico, that he is familiar with the values of lands in said county, and in a general way familiar with the land involved in this action, to-wit:

E. ½ of N. W. ¼, Sec. 20, Twp. 6 N., R. 27 E., N. M. P. M., and the S. E. ¼ of the N. W. ¼ and S. W. ¼ of S. E. ¼ of Sec. 5, T. 5 N., R. 27 E., and E. ½ of S. W. ¼, Sec. 5, T. 5 N., R. 27 E., N. M. P. M., all situated in Quay County, New Mexico, 240 acres.

That in his opinion the market value of said lands during all of the times of the pendency of this action would not exceed the sum of $1500.00.

HARRY H. MCELROY.

Subscribed and sworn to before me this 10th day of February, A. D. 1912.

(Seal) SAMUEL H. MCELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

In the Supreme Court of the United States of America. October term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

AFFIDAVIT.

State of New Mexico, County of Quay.

Murray W. Shaw, being duly sworn, on his oath

says, that he is a resident of Quay County, New Mexico, and resides in the neighborhood of the lands hereinafter described, and has so resided for the past three years; that he is familiar with the values of lands in Quay County, New Mexico, of the class of the lands hereinafter described, and of the lands so described; that he knows the location and character of the following described land and real estate, to-wit:

E. ½ of N. W. ¼, Sec. 20, Twp. 6 N., R. 27 E., and S. E. ¼ of N. W. ¼, and S. W. ¼ of S. E. ¼, Sec. 5, T. 5 N., R. 27 E., and E. ½ of S. W. ¼ of Sec. 5, T. 5 N., R. 27 E., N. M. P. M., all situated in Quay County, New Mexico, a total of 240 acres.

That the reasonable market value of said lands at this time and at all times since the 1st day of May, 1910, was and is not to exceed the sum of $1500.00.

MURRY W. SHAW.

Subscribed and sworn to before me this the 23d day of February, A. D. 1912.

(Seal) SAMUEL H. McELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

In the Supreme Court of the United States of America. October term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

AFFIDAVIT.

The State of New Mexico, Sixth Judicial District, County of Quay.

James S. Elliott of lawful age, being duly sworn, on his oath says, that he is a resident of Quay County,

New Mexico, and has resided in the neighborhood of the lands hereinafter described for the past four years; that he is familiar with the market values and selling price of lands in said county and community; that he knows the location and character of the following described land and real estate, to-wit:

E. ½ of N. W. ¼ Sec. 20, Twp. 6 N. R. 27 E., and S. E. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼ Sec. 5, T. 5 N., R. 27 E., and E.½ of S. W. ¼ of Sec. 5th, T. 5 N., R. 27 E., N. M. P. M., all situated in Quay County, New Mexico, a total of 240 acres.

That in my opinion the reasonable market value of said lands at the time and at all times since the 1st day of May, 1910, was and is not to exceed the sum of $1500.00.

(Signed) JAMES S. ELLIOTT.

Subscribed and sworn to before me this the 23d day of February, A. D. 1912.

MURRY W. SHAW,
(Seal) *U. S. Commissioner.*

In the Supreme Court of the United States of America. October Term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

The State of New Mexico, Sixth Judicial District County of Quay.

Joseph H. Montgomery, of lawful age, being duly sworn, on his oath says that he is a resident of Quay County, New Mexico, and has resided in the neighborhood of the lands hereinafter described for the past 4 years; that he is familiar with the market values and selling price of lands in said county and community; that he knows the location and character of the following described land and real estate, to-wit:

E. ½ of N. W. ¼ Sec. 20, Twp. 6 N., R. 27 E., and S. E. ¼ of N. W. ¼ and S. W. ¼ of S. E. ½ Sec. 5, T. 5 N., R. 27 E., and E. ½ of S. W. ¼ of Sec. 5th, T. 5. N., R. 27 E., N. M. P. M., all situated in Quay County, New Mexico, a total of 240 acres.

That in my opinion the reasonable market value of said lands at this time and at all times since the 1st day of May, 1910, was and is not to exceed the sum of $1500.00

(Signed) J. A. MONTGOMERY.

Subscribed and sworn to before me this the 23d day of February, A. D., 1912.

MURRY W. SHAW,
(Seal) *U. S. Commissioner.*

In the Supreme Court of the United States of America. October Term, 1911. A. Straus, Appellant, vs. W. L. Foxworth, Appellee. No. 983.

AFFIDAVIT.

State of New Mexico, County of Quay.

James A. Street, being duly sworn, on his oath says that he is a resident of Quay County, New Mexico; that he was formerly Sheriff of Quay County, New Mexico, and as such officer has had occasion to travel over all parts of said county, and especially in the neighborhood of the land hereinafter described; that he is familiar with the values of lands in said county; that he has bought and sold lands in said county of the general character of the lands herein referred to; and that he knows the location and character of the following described lands, lying and being in Quay County, New Mexico, to-wit.

E. ½ of N. W. ¼ Sec. 20, Twp. 6 N., R. 27 E., and S. E. ¼ of N. W. ¼ and S. W. ¼ of S. E. ¼

of Sec. 5, T. 5 N., R. 27 E., and E.½ of S. W. ¼ of Sec. 5, T. 5 N., R. 27 E., N. M. P. M., a total of 240 acres, more or less, according to government survey.

That in his opinion the reasonable market value of said lands at all times since the 1st day of May, 1910, was and now is not to exceed $1000.00.

JAMES A. STREET.

Subscribed and sworn to before me this the 8th day of April, A. D., 1912.

(Seal) SAMUEL H. McELROY,

Notary Public, Quay County, New Mexico.

My commission expires December 1, 1915.

CERTIFICATE.

State of New Mexico, County of Quay.

I, J. D. Cutlip, Judge of the Probate Court, do hereby certify that I am well acquainted with certain of the persons signing the foregoing affidavits, to-wit, Ira, J. Briscoe, Assessor of Quay County, George Evans, Lee Sherwood and Murry W. Shaw, and believe them to be persons of good moral character and worthy of belief.

This March the 30th, 1912. Tuncumcari, New Mexico.

J. D. CUTLIP,
Judge of the Probate Court,
Quay County, New Mexico.

CERTIFICATE.

State of New Mexico, County of Quay.

I, J. D. Cutlip, Judge of the Probate Court,

Quay County, New Mexico, do hereby certify that Samuel H. McElroy, before whom certain of the foregoing affidavits were made as Notary Public, is a qualified and acting Notary Public of and for Quay County, New Mexico, and was such on the dates of taking of said affidavits, and that his signature to said instruments as such Notary Public are genuine.

This 30th day of March, 1912, at Tucumcari, New Mexico.

J. D. CUTLIP,
Judge of the Probate Court,
Quay County, New Mexico.

CERTIFICATE.

I, D. J. Finegan, Clerk of the Probate Court, Quay County, New Mexico, and County Clerk of said county, do hereby certify that J. D. Cutlip, who signed the two foregoing certificates is the Judge of the Probate Court of Quay County, New Mexico, and that his signatures thereto are genuine.

I further certify that Samuel H. McElroy, whose jurats to certain of the foregoing affidavits as Notary Public, was at the times of signing same and now is a duly qualified and acting Notary Public of Quay County, New Mexico, and that his signatures thereto are genuine.

D. J. FINEGAN,
County Clerk and Ex-officio Clerk of the Probate Court, Quay County, New Mexico.

(Seal)

10

Office Supreme Court, U.S.
FILED.
DEC 9 1912
JAMES H. McKEN

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,
Appellant,

vs.

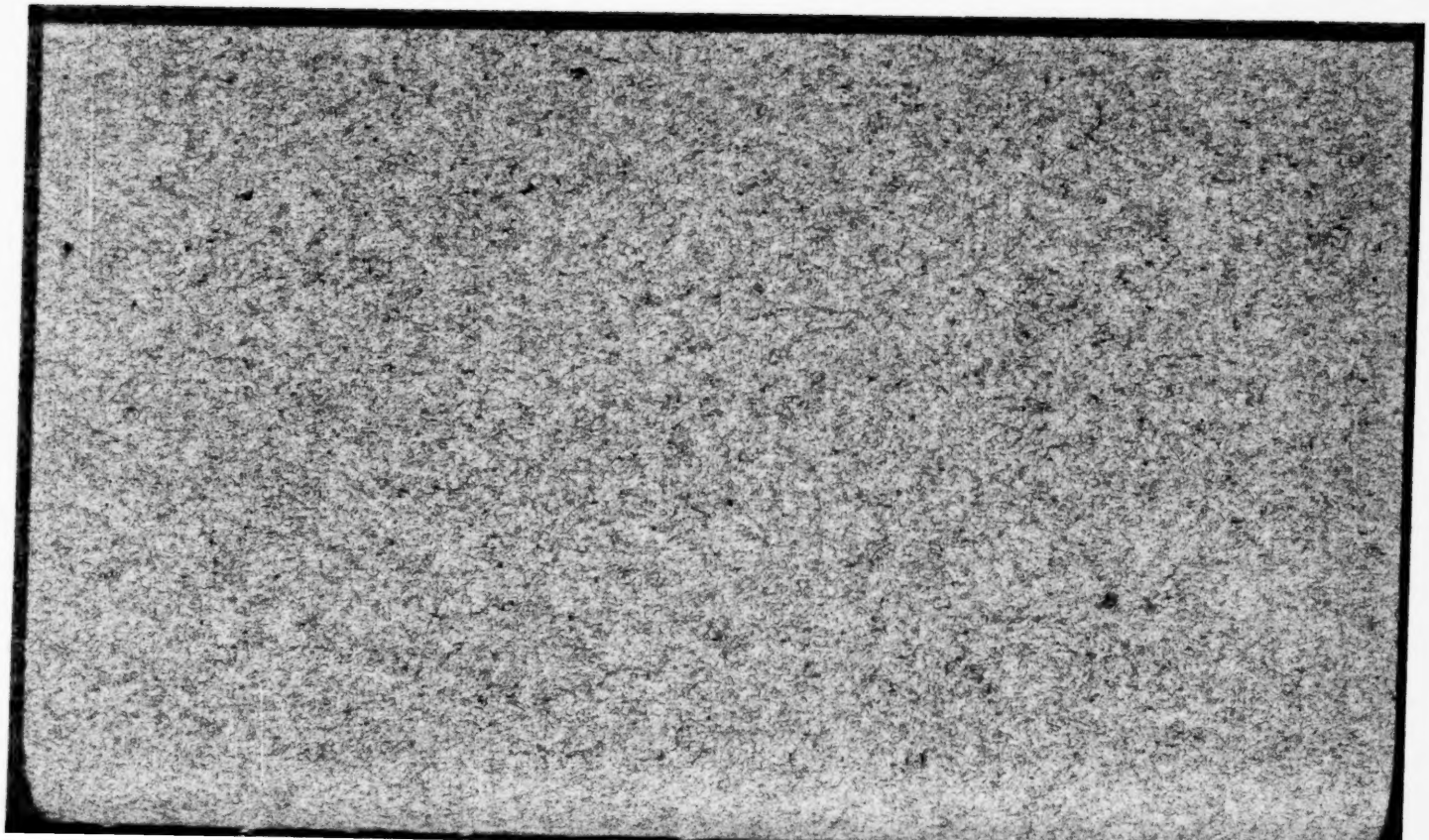
W. L. FOXWORTH,
Appellee.

19
No. 55

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT.

WILLIAM C. REID,
JAMES M. HERVEY,
Attorneys for Appellant.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

A. STRAUS,
Appellant,

vs.

W. L. FOXWORTH,
Appellee.

No. 983.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

A. STRAUS,

Appellant,

vs.

W. L. FOXWORTH,

Appellee.

No. 983.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Appellant, Straus, by judgment of court became the owner of a large cattle ranch covering an area of approximately thirty miles square, about six thousand acres of which was patented land, in small tracts, covering natural water, and by reason thereof con-

trolling a large area of the public lands as a cattle range. This patented land was distributed in parts of three counties; the tracts of land in question in this case being situate in Quay County, New Mexico. It appears that the former owners of this land, The Horseshoe Land and Cattle Company, had failed to pay the taxes on the Quay County land for the year 1904, and on the 5th day of March, 1906, the said land was sold at tax sale to the appellee. The appellant brought this suit to quiet the title to this land, alleging:

(a) Such sale was not sufficiently advertised for four consecutive weeks prior to the return date of such sale.

(b) That the printer who published the delinquent tax list upon which such sale was based, did not immediately after the last publication thereof, transmit to the collector of the said County of Quay, an affidavit or proof of such publication by any person to whom the fact of such publication was known substantially in the form prescribed by statute, or any other form.

(c) That the collector of said County of Quay did not make, nor cause to be made, an affidavit of posting such delinquent tax sale or notice as required by statute and did not cause an affidavit of the publisher of such list or the affidavit of posting such list to be deposited with the Probate Clerk of said county.

(d) That the Probate Clerk of said county did not carefully preserve such affidavits or any affidavits or proof of such publication and posting such list as required by statute.

(e) That at the alleged sale, aforementioned, it was attempted to sell said land for taxes alleged to be delinquent for the year 1904; that the sum alleged to be due against said land for taxes for the year 1904, and for which said land was attempted to be sold was $4.02, whereas the sum levied and assessed against the said land was in fact but $3.78 (Tr. p. 3).

The several causes of action stated in the complaint were deemed necessary under the New Mexico Code of Civil Procedure, by reason of their being distinct sales and deeds.

The said tax sale was made under authority of Chapter 22 of the Session Acts of the New Mexico Legislature of 1899, and more particularly under Section 31 of said Chapter 22, which section is hereinafter set out in full, in treating of the fifth assignment of error.

To the complaint which sets forth the above grounds for setting aside the tax deed under said sale, the defendant below demurred, the first ground of said demurrer being sustained, and overruled as to the remainder of the grounds, the first ground being:

"That in and by said counts, plaintiff makes collateral impeachment of certain tax sales, tax sales

certificates and tax deeds, in said complaint mentioned and described, and that the same are insufficient in this, to-wit, that plaintiff does not set up either of the grounds allowed by statute for the collateral impeachment of such tax title, to-wit, either that taxes had been paid at the time of such sales, or that the real estate was not liable to the tax or assessment, and that the grounds set up by plaintiff in such attempted collateral impeachment of such tax titles are insufficient for the reason that the statute declares that such certificate of tax sales shall be conclusive evidence of their regularity and validity, in all collateral proceedings, except in cases where taxes had been paid, or the real estate was not liable to the tax assessment" (Tr. p. 5).

This ground of demurrer is based upon Section 25 of the said Chapter 22 of the Laws of 1899, which said section reads as follows:

"Sec. 25. It is hereby made the duty of every person, firm or corporation owning or having any interest, legal or equitable, in any real estate or other property, in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the assessment roll and delinquent tax list for any year by such description as will serve to identify the same, the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this

act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and costs, had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal sub-division of real estate, be sold as hereinbefore provided, upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such portion of said tract or sub-division upon which the taxes had not been paid."

The Supreme Court affirmed the judgment of the District Court of Quay County, and the case is now before the Supreme Court of the United States on appeal. A motion has been filed asking this court to limit the question on appeal to the Federal question involved upon the ground that the value of the property involved in this suit is less than five thousand dollars. An affidavit of J. O. Curtis is filed and printed in this case, showing the value to be more than five thousand dollars, and appellant's affidavit to this fact appears in the transcript of record at page 17.

SPECIFICATION OF ERRORS RELIED UPON.

First. The court erred in holding and deciding that the provisions of Chapter 22 of the Acts of the Legislative Assembly for the territory of New Mexico for the year 1899, are not in conflict with, and in violation of, the provisions of the 14th Amendment of the Constitution of the United States, for that the territory of New Mexico, by and through the provisions of said Chapter 22 assumes and seeks to deprive the appellant and other citizens of the United States of property, without due process of law.

Second. The court erred in sustaining the demurrer to the complaint as shown by the first ground set out in said demurrer in paragraph one.

Third. The court erred in holding and deciding that the words "sold at tax sale in accordance with this act" as found in Section 25 of Chapter 22 of Laws of New Mexico, 1899, did not mean that the mandatory provisions of said act were to be followed, but meant no more than a reference to sales under said act as distinguished from sales under some other act.

Fourth. The court has erred in holding and deciding that the allegation in paragraph 2e of the complaint "that the sum alleged to be due against said land for taxes for the year 1904 and for which the land was attempted to be sold was $4.02; whereas the sum levied and assessed against the said land was in fact $3.78," meant that there were costs sufficient to cover the difference, and in so holding, considered this fact proven by statement of counsel, the matter before the court being a demurrer.

Fifth. The court erred in holding and deciding that the provisions of Section 31 of Chapter 22 of the Laws of New Mexico of 1899, as to the date of sale are not mandatory, and that a certificate of sale attempted to be made under said section, though none of the provisions thereof was followed, has the same force and effect as certificates issued in sales on judgments and executions.

The decree is erroneous in that it holds that a statute which provides the essentials in procedure for the taking of property for taxation need not be complied with when such property is so taken, and further holds that when the amount for which property is sold is in excess of the amount actualiy levied and assessed that as to such excess there was a tax due.

BRIEF AND ARGUMENT.

Treating of the First Assignment of Error.

FIRST POINT.

First. The court erred in holding and deciding that the provisions of Chapter 22 of the Acts of the Legislative Assembly for the territory of New Mexico for the year 1899, are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the territory of New Mexico, by and through the provisions of said Chapter 22 assumes and seeks to deprive the appellant and other citizens of the United States of property, without due process of law.

The case being before this court on appeal from a territory, this court has jurisdiction to consider both the questions of "due process of law" under the 14th Amendment, and the "essentials under the territorial statute," which constitute due process of law.

Section 25 of Chapter 22, Laws of 1899 of New Mexico, in effect, if given the effect contended for by the Supreme Court of New Mexico, permits the taking

of property by the territory for taxation, without assessment, levy, notice or notice of sale, for the reason that after sale is made the same cannot be attacked, except for the two grounds, *first*, that the tax had been paid, and *second*, that the property was not subject to taxation. We respectfully submit that this statute, given the effect given by the judgment of the Supreme Court of New Mexico, (tr. p. 19) would not be due process of law under the provisions of the 14th Amendment to the Constitution of the United States. We concede the proposition that the owner of real estate on *which a tax has been laid* is not entitled, as a matter of right, to have it sold to pay the tax. Even though it be possible that it may be forfeited without notice if the statute so provided, the very fact that the statute so provides is due process of law. But in the case at bar, we have, in effect, a statute that makes a tax deed conclusive, except the land is not subject to taxation, or that the tax has been paid. The officers might levy a tax on the land, which was entirely unauthorized, and sell the property for such tax and thereby shut off all defense against it. The effect of this statute as construed by the Supreme Court of New Mexico, is that *no* process of law is provided for the taking of one's property and he is confined to an exceedingly limited process in recovering it.

Appellee, in the court below, relied upon three cases in support of the proposition that due process of

law is provided by this statute, and the Supreme Court of New Mexico also relied upon these cases, to-wit:

DeTreville vs. Smalls, 98 U. S. 517;
Keely vs. Sanders, 99 U. S. 441;
Sherry vs. McKinley, 99 U. S. 496.

All these cases were the outgrowth of the enforcement of an Act of Congress of June 7, 1862, (12 Stat. 422) as amended by Act of February 6, 1863 (12 Stat. 640) and entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts Within the United States and for Other Purposes."

As stated in the case of *Sherry vs. McKinley*, *supra*, "The sole grounds upon which the Supreme Courts of the State rested their decrees in these cases, declaring the tax sales to be invalid, was, that the military authority of the United States had not been established throughout the county of Shelby when they took place." It evidently being conceded that a state of war or insurrection existed in the particular part of the country in which the law was sought to be enforced, and further conceded that the due process clause of the 5th Amendment to the Constitution of the United States did not apply under such circumstances, under the rule in *Tyler vs. Defrees*, 11 Wall. 331, as that question was not raised. Of course the 14th Amendment did not apply because it had not yet become a part of the Constitution, and if it had been in existence, it was not a state statute that was being considered.

It is evident that the courts have considered that some of the *dictum* followed by the Supreme Court of New Mexico in the three cases cited above did not apply to other than times of insurrection, as these cases are not cited as authority by the Federal courts, or to any great extent by the State courts, except as establishing the rule of law that by statute a tax deed may be made *prima facie* evidence of its validity; a rule that is not questioned in this case.

That a legislature may not provide machinery for the collection of taxes, and then disregard the steps required, and cure the failure to follow the essentials by a curative statute or concurrent statute, is denied by Judge Cooley in his work on Taxation, Vol. I, (3d Ed.) at pages 518 and 519, from which we quote as follows:

"The general rule has often been declared that the Legislature may validate retrospectively the proceedings which they might have authorized in advance which are not so far of the essence of the thing to be done that they must be provided for in any statute on the subject, the Legislature may retrospectively cure the defect. But there are probably some exceptions to this general rule. If the law has afforded the party an opportunity to be heard, when it might have been dispensed with, he has a right to rely upon this for protection, and we should doubt the right of the Legislature to take it away by retrospective law. There are some cases, which, we think, recognize this right to a hearing which the law has given, as constituting an exception to the general right of the Legislature to

cure defects. And the reason of the exception will apply to all cases in which notice to the party, by publication or otherwise, has been provided for his protection. If this can be dispensed with by a healing act, the very provision for a notice for the party's protection becomes a trap for his destruction."

There are a few courts—the courts of Iowa in particular—which seem to hold that though the statute provides for notice of sale for delinquent taxes, yet the Legislature may at the same time provide that a tax deed is conclusive evidence that such notice has been given, evidently overlooking the fact that this notice is a part of the "due process of law" and is jurisdictional. The weight of authority however, is to the contrary. The leading case is *Marx vs. Hanthorn*, 148 U. S. 172, wherein the Supreme Court of the United States held the notice of sale was an essential part of the proceedings, and that the Legislature did not have power to make the tax deed conclusive evidence of the fact. This case is contrary to the *dictum* of three former ceses in the Supreme Court, to-wit, *De-Treville vs. Smalls, Keely vs. Sanders, and Sherry vs. McKinley, supra*, and makes no mention of them, the court perhaps deeming those cases as not declaring the law, as to the due process clause.

The opinions in all three of these cases were written by Mr. Justice Strong, and all dissented from by Mr. Justice Field.

It is a singular fact that in his great work on Taxation, Judge Cooley—who was a great constitutional lawyer and judge, and the greatest American authority on the law of taxation—does not refer in his work on taxation to either of these cases on the *dictum* which was relied upon by counsel for the appellee, below. The DeTreville case is referred to but twice by Judge Cooley: *First*, upon the proposition that "penalties are more often imposed under Federal than State laws."

Cooley on Taxation, Vol. 2, p. 899.

Second, by statute a tax deed can be made *prima facie* evidence of the legality of the proceeding leading up to the deed.

Cooley on Taxation, p. 1007.

The case of *Keely vs. Sanders* is referred to by Judge Cooley but four times, the *first*, to illustrate that assessors in assessing certain bridges shall state (under the statute) "the metes and bounds of the ground occupied by such bridge;" the assessors shall state the length of the bridge and approach. Cooley on Taxation, p. 750. *Second*, that the sale of two parcels of land is not void if the sale is a joint sale. Cooley on Taxation, p. 951. *Third*, that by statute a tax deed can be made *prima facie* evidence of the regularity of the proceedings leading up to the deed. *Fourth*, that the

time given to redeem cannot be enlarged by circumstances of excuse, like the prevalence of civil war, unless provided for by statute.

Cooley on Taxation, p. 1027.

The fact that the *dictum* by the Supreme Court in these cases has not been followed in the Federal and State courts, nor by text-book writers to any great extent, can be accounted for only on the theory that such position is, except in times of insurrection, fundamentally wrong, where the due process clause is in question. The Supreme Court later lays down the correct rule where the due process clause of the 14th Amendment is in question, in the case of *Marx vs. Hanthorn*, 148 U. S., p. 172, in which the court says:

"It is competent for a Legislature to declare that a tax deed shall be *prima facie* evidence, not only of the regularity of the sale, but also of all prior proceedings, and of title in the purchaser; but as the Legislature cannot deprive one of his property by making his adversary's claim to it conclusive of its own validity, it cannot make a tax deed conclusive evidence of the holder's title to the land.."

This case of *Marx vs. Hanthorn, supra*, is cited in Cooley on Taxation, as follows:

"While it is competent for the Legislature of a state to declare that a tax deed shall be *prima facie* evidence of the regularity of the sale, and of all pro-

ceedings prior thereto, such a deed cannot be made conclusive evidence of the grantee's title to the land."

Marx vs. Hanthorn, 148 U. S. 172;
Taylor vs. Deveaux, 100 Mich. 581;
McKinnon vs. Weston, 104 Mich. 642;
Weeks vs. Merkle, 6 Okla. 714;
Wilson vs. Wood, (Okla.), 61 Pac. Rep. 1045;
Kelly vs. Herrall, 20 Fed. Rep. 364;
Bannon vs. Burns, 39 Fed. Rep. 892.

"A statute therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because not a law regulating evidence, but an unconstitutional confiscation of property."

McCready vs. Sexton, 29 Iowa, 356;
Marx vs. Hanthorn, 148 U. S. 172;
Kelly vs. Herrall, 20 Fed. Rep. 364, 368;
Marx vs. Hanthorn, 30 Fed. Rep. 579;
Railroad Co. vs. Galvin, 85 Fed. Rep. 811;
Cairo etc. R. Co. vs. Parks, 32 Ark. 131;
Little Rock, etc. R. Co. vs. Payne, 33 Ark. 816;
Wampole vs. Foote, 2 Dak. 1;
Dickerson vs. Acosta, 15 Fla. 614;
White vs. Flynn, 23 Ind. 46;
Corbin vs. Hill, 21 Iowa, 70;
Powers vs. Fuller, 30 Iowa, 476;
Taylor vs. Miles, 5 Kan. 498;
Baumgardner vs. Fowler, 82 Md. 631;
Grocsbeck vs. Seeley, 18 Mich. 329;
Case vs. Dean, 16 Mich. 12;
Taylor vs. Deveaux, 100 Mich. 581;
McKinnon vs. Weston 104 Mich. 642;
Dawson vs. Peter, 119 Mich. 274;

Abbott vs. Lindenbower, 42 Mo. 162, 46 Mo. 291;
Roth vs. Gabbert, 123 Mo. 29;
Wright vs. Cradlebraugh, 3 Nev. 341, 349;
Young vs. Beardsley, 11 Paige, 493;
East Kingston vs. Fowle, 48 N. H. 57;
Sheets vs. Paine, (N. D.), 86 N. W. Rep. 117;
Strode vs. Washer, 17 Or. 50;
Mather vs. Darst, 13 S. D. 75.

"And the notice is bad if it differs from the assessment in giving the name of the person to whom the land is taxed."

Marx vs. Hanthorn, 148 U. S. 172, 30 Fed. Rep. 579;
Harness vs. Cravens, 126 Mo. 233;
Bettison vs. Budd, 21 Ark. 578, citing *Wait vs. Gilmore*, 2 Yeates, 330;
Shimmin vs. Inman, 26 Me. 332;
Del Castillo vs. McConnico, 168 U. S. 674;
Alvord vs. Collin, 20 Pick. 418;
Workingmen's Bank vs. Lannes, 30 La. An. 871.

"That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful; the attempt is a plain violation of the great principle of Magna Charter which has been incorporated in our bill of rights, and if successful, would in many cases deprive the citizen of his property, by proceedings absolutely without warrant of law or of justice; it is not in the power of any American Legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot therefore, make the tax deed con-

clusive evidence of the holder's title to the land, or of the jurisdictional facts which would make out title."

Marx vs. Hanthorn, 148 U. S. 172;
Kelly vs. Herrall, 20 Fed. Rep. 364, 368;
Marx vs. Hanthorn, 30 Fed. Rep. 579;
Martin vs. Barbour, 34 Fed. Rep. 701;
Tracy vs. Reed, 38 Fed. Rep. 69;
Bannon vs. Burns, 39 Fed. Rep. 892;
Davis vs. Minge, 56 Ala. 121;
Oliver vs. Robinson, 58 Ala. 46;
Cairo, etc. R. Co. vs. Parks, 32 Ark. 131;
Radcliffe vs. Scruggs, 46 Ark. 96;
Townsend vs. Martin, 55 Ark. 192;
Cooper vs. Freeman Lbr. Co., 61 Ark. 36;
Ramish vs. Hartwell, 126 Cal. 443;
Wampole vs. Foote, 2 Dak. 1;
Dickerson vs. Acosta, 16 Fla. 614;
Manguiar vs. Henry, 84 Ky. 1;
Baumgardner vs. Fowler, 82 Md. 631;
Taylor vs. Deveaux, 100 Mich. 581;
McKinnon vs. Weston, 104 Mich. 642;
Dawson vs. Peter, 119 Mich. 274;
Roth vs. Gabbert, 123 Mo. 21, 29;
Larson vs. Dickey, 39 Neb. 463;
Roberts vs. First Nat. Bk., 8 N. D. 504;
Dever vs. Cornwall, (N. D.) 86 N. W. 227;
Weeks vs. Merkle, 6 Okla. 714;
Wilson vs. Wood, (Okla.) 61 Pac. Rep. 1045;
Strode vs. Washer, 17 Or. 50;
Simpson vs. Meyers, 197 Pa. St. 522;
Salmer vs. Lathrop, 10 S. D. 216;
Mather vs. Darst, (S. D.) 82 N. W. Rep. 407;
State vs. Dugan, 105 Tenn. 245;
Virginia Coal Co. vs. Thomas, 97 Va. 527.

A great portion of the opinion of the court below

is founded on the erroneous assumption that the United States statute which was under consideration in the cases of *Keely vs. Sanders, DeTreville vs. Smalls* and *Sherry vs. McKinley, supra*, is a "statute practically identical with our own." We submit, however, that there are very great differences. The United States statute insofar as it concerns this case, is as follows:

"Which said certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of the said sale, and of the title of the said purchaser or purchasers under the same; *and provided further*, that the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that the said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

That portion of the New Mexico statute particularly under consideration is as follows:

"The sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in *listing* the same, upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review of other action attacking the title to any property sold at tax sale *in accordance with this act* shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest and

costs had been paid before the sale, or that the property was not subject to taxation."

It will be seen that the United States statute merely affects a rule of evidence; whereas, the New Mexico statute, if it has the effect contended for by appellee, takes away a right of action, and more than that, the property of the owner of lands which are subject to delinquent tax. But the greatest difference is found in that provision present in the New Mexico statute, and absent in the United States statute, to-wit: that provision which attempts to make the tax deed conclusive evidence of title for "property sold at tax sale *in accordance with this act.*" The words "in accordance with this act" certainly have a meaning. What can that meaning be, if it does not mean that the procedure laid down for *sale* in the act, must be followed, and that as a condition precedent to the sale precluding the owner from setting up irregularities in a procedure leading up to and including such sale "in accordance with this act," viz: must have followed the mandatory provisions of the statute leading up to the sale? The Supreme Court of New Mexico held that it meant a sale under *this* statute as distinguished from some *other* statute, but the statute itself provided, in the last section thereof, that it should not affect taxes already assessed, and except as to taxes theretofore assessed, there was no *other* statute, and these words would have been entirely unnecessary.

We have called the court's attention to the fact that these decisions have not been followed by any text book writer upon taxation. They are not cited as authority upon the points contended for by the appellee, in any United States case, and in a very few state cases, and that in addition to this, in a very much later case, to-wit, the case of *Marx vs. Hanthorn, supra*, the Supreme Court of the United States has announced a rule directly opposite to that which may be inferred from the decisions of the three cases above mentioned.

The case of *Marx vs. Hanthorn, supra*, has become the settled authority cited and followed by both the Supreme Court of the United States and by many of the Federal Courts, and a great many of the state courts. It has been cited as authority, for the principle announced, by every text book writer on taxation since the case was reported.

The appellee in the court below intimated that the three cases were followed by the United States Supreme Court in the case of *Springer vs. United States*, 102 U. S. 594, and while those cases are cited therein, the Springer case was upon a different question than that which was presented in these cases, and the ruling in those cases was not discussed or examined.

Appellee also intimated that the case of *Turpin vs. Lemon*, 187 U. S. 551, sustains the position taken by the same court in the three cases above mentioned.

The Turpin case does not mention either of those cases. It does mention the Marx case as a case that determines the rule that will be followed by the Supreme Court of the United States.

The case of *Ontario Land Company vs. Yordy*, 212 U. S. 152, cited by appellee below, is not a case in point on the contention of appellee. This case was one under a Washington statute where the sale of land was under a judgment of foreclosure, and the parties had been in court by regular process, and it certainly is to be distinguished from sale where there is no judgment such as the case at bar.

The case of *Central Railway vs. Georgia*, 207 U. S. 127, is based upon facts where a tax officer makes the assessment where the owner has failed to make a return, and such assessment is made without an opportunity for the owner to be heard. The Supreme Court holds that this is not due process of law, and the statute so providing for such procedure, is contrary to the Constitution of the United States.

The cases of *King vs. Mullins*, 171 U. S. 404, and the case of *Kentucky Union Co. vs. Kentucky*, Vol. 31 Sup. Ct. Rep. 171, are to be distinguished in that after forfeiture for failure to make return, the state constitution or statute were construed to give the owner opportunity to defend or redeem.

The case of *Castillo vs. McConnico*, 168 U. S. 674, merely holds that where the notice of sale has been

held sufficient by the state court, no federal question is presented. This case was relied upon by appellee below, on one other point, and the Supreme Court of New Mexico fell into the error of the appellee, (Tr. p. 21). The court in the Castillo case in speaking of the case of *Marx vs. Hanthorn, supra*, mentions the fact that the latter case is construing an Oregon statute, and follows the decisions of the court of last resort of that state. This has been seized upon as we have above stated, by appellee, to show that the Supreme Court did not lay down a general principle to be followed, in the Marx case, but this assumption is not borne out by the text of the opinion. The Marx case was on appeal from the Circuit Court of the United States for the district of Oregon. We quote from that opinion as follows:

"Without going at length into the discussion of a subject so often considered, *we think the conclusion reached by the courts, generally, may be stated as follows*: 'It is competent for the Legislature to declare that a tax deed shall be *prima facie evidence* not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, *but that the Legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot therefore, make a tax deed conclusive evidence of the holder's title to the land.*'" (Italics are ours.)

We are unable to see wherein the court attempts to restrict the above principle of law so forcibly laid

down to the particular statute of Oregon. What we believe the Supreme Court intended by its reference to the Marx case, was that in both the Marx case and the Castillo case the validity of a tax deed was questioned by reason of the assessment in each instance being under an incorrect name and that in Oregon this had been held fatal, while in Louisiana, it was held that the sale was authorized by the statute.

The case of *Marx vs. Hanthorn*, has been followed in *Clark vs. Mead*, 102 Cal. 519, 36 Pac. 863, wherein it is held that the Legislature may make a tax deed *prima facie* evidence of proceedings requisite to validity; in the case of *Bennett vs. Davis*, 90 Me. 107, 37 Atl. 866, wherein it is held that an act requiring the owner of land sold for taxes to deposit amount thereof with costs, before contesting validity of sale, is void; in the case of *Baumgardner vs. Fowler*, 82 Md. 639, 34 Atl. 538, wherein it is held that an act making order of ratification of tax sale conclusive evidence of regularity of treasurer's proceedings, is void; held to be law on this subject as determined by the Supreme Court of the United States in the case of *Coper vs. Lawrence Bros. Co.*, 201 U. S. 370. In the case of *Wilson vs. Wood*, 10 Okla. 284, 61 Pac. 1046, the question was, whether the rule as established by the Supreme Court of the United States was, that the Legislature had power to declare a tax deed conclusive

evidence of the compliance with those matters which are essential to the exercise of taxing power, or whether it had no power to declare recitals in a tax deed conclusive evidence of the compliance with such matters. The Oklahoma statute in question was as follows:

"That if the land is not redeemed within two years and the certificate of purchase has not been returned for cancellation, the treasurer shall execute a deed to the purchaser, his heirs or assigns, which deed shall vest in the grantee an absolute estate in fee simple in such land."

That court said:

"There has been much discussion by the text writers and jurists as to how far the legislature may go in making matters of evidence conclusive without infringing on the constitutional limitations. The Supreme Court of the United States in *Marx vs. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. Rep. 508, 37 L. Ed. 410, said: 'It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence, not only of the regularity of the sale but of all prior proceedings, and of the title of the purchaser; but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.' In *McCready vs. Sexton*, 29 Iowa, 356, the Supreme Court, after an exhaustive review of this question, sums up as follows: 'We conclude, therefore, upon principle, as well as upon precedent and authority, that the legislature does not possess power to declare the tax deed to be conclusive evidence of compliance with those matters which are es-

sential to the exercise of the taxing power; but as to non-essentials, or matters merely directory, such power may exist, and the deed becomes conclusive of their due performance.' This rule requires some modification, or rather extension. It may be said to be correct that the legislature has no power to declare the tax deed to be conclusive evidence of compliance with those matters which are essential to the exercise of the taxing power, but we think it equally as correct that the legislature cannot make the tax deed conclusive evidence of compliance with any act or condition required to be done or performed, which is necessary to divest title to, or interests in, real estate, and vest the same in the grantee in a tax deed. Judge Cooley, in his valuable treatise on Constitutional Limitations (6th Ed. p. 452) states the true rule to be as follows: 'But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof, in civil causes, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights, excepting those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations, the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce proofs. The most formal conveyance may be a fraud or a forgery. Public officers may connive with rogues to rob the citizen of his property, witnesses may testify or officers certify falsely, and records may be collusively manufactued for dishonest purposes; and

that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute therefore which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being, not a law regulating evidence, but an unconstitutional confiscation of property.'" This same doctrine was announced by this court in *Weeks vs. Merkle*, 6 Okla. 714, 52 Pac. 929.

"As the certificate and the proper assignment of it were necessary steps precedent to the issuing of a valid tax deed in the case under consideration, we think the legislature had no power to preclude the persons interested in the real estate sought to be conveyed from having their validity inquired into. The assignment relied upon was in fact void. Without an assignment, no valid deed could issue to the plaintiff in error; and, as there was no assignment made in the manner required to transfer the interest in the land represented by the tax certificate, it follows, that the deed was not valid as against the mortgagee."

The case of *Marx vs. Hanthorn* was cited by Mr. Chief Justice Fuller with approval in the case of *Meyer vs. Kuhn*, 65 Fed. 705. See also case of *Marx vs. Hanthorn*, 30 Fed. 579.

We submit in view of the fact that the courts, both federal and state, have almost exclusively followed the principle laid down in *Marx vs. Hanthorn*, and have not followed or cited with approval the DeTreville or Keely cases, that it must be now assumed that the prin-

ciple announced in the case of *Marx vs. Hanthorn* is the law governing in the Territory of New Mexico at the date of this sale.

In discussing a statute of Missouri similar to the New Mexico statute, Judge Phillips said, in the case of *Bannon vs. Barnes*, 39 Fed. 895:

"Plaintiff's tax title, therefore, must fail, unless, as suggested in the argument, the imputed infirmity be helped by the provision of section 64 of said article of the chapter, which declares, that the tax deed made after the prescribed form shall be conclusive evidence of almost everything essential to its validity, except that proof may be made that taxes were paid before sale, or that the property was not subject to taxation, or that it had been redeemed or the money tendered. It is to be conceded that the provisions of this chapter respecting the validity of such deeds are very sweeping. And while the courts should treat with great respect the enactment of the legislative department of government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the legislature cannot do. It cannot take the citizen's private property, even for public use, without due process of law. It cannot prescribe a method by, and the conditions on which, property may be sold for taxes, and by the same act declare that when sold the deed shall be good, although the prescribed method was not pursued and the required conditions of sale were not regarded; especially where such conditions were precedent facts essential to confer jurisdiction on the body or person undertaking to sell. Due process of law is not any process which the legislative power may devise. As said by Mr. Justice Curtis in *Murray's Lessee vs. Improve-*

ment Company, 18 Howard 276: 'The article (of the constitution) is a restrain on the legislative as well as on the executive and judicial powers of the government and cannot be construed as to leave congress (the legislature) free to make any process, "due process of law," by its mere will.' "

Attention of the court is called to the fact that the opinion in the Bannon case *supra*, was written many years after the DeTreville and Keely cases hereinbefore discussed.

Further on the proposition that a legislature has not power to enact a statute which denies the owner the right to show that the defects were in excess of that authorized by the levy, we cite the case of *Lufkin vs. the City of Galveston*, 11 S. W. Rep. 340, and quote from this case as follows:

"But the Chapter provides that the tax collector's deed shall not be conclusive evidence of the following facts: (1) That the land or lot, or portion thereof, sold, was advertised for sale in the manner and for the time required by law. (2) that the land was sold for taxes or assessments as stated in the deed; (3) that the grantee in the deed was the purchaser; (4) that the sale was conducted in the manner prescribed by law." *Id.* "The same section also provides that the person claiming adversely to the tax-title, in order to defeat it, shall be required to prove, 'either that the land was not subject to taxation at the date of the sale; that the taxes or assessments had been paid; that the land had never been listed and assessed for taxation and assessments; * * * or that the same had been redeemed,' etc. Was this intended to preclude

the inquiry into the validity of the taxes for which the land is sold? We think not. Even if the language admitted of that construction there is a controlling reason why that interpretaton cannot be received. The constitution limits the power of the legislature to declare the conclusive effect of a tax deed. As to these facts, which must exist in order to call into exercise the power of the officer to make the sale—the facts essential to give him jurisdiction over the property—an inquiry into the courts of the country cannot be precluded. To say that this could be done would be to hold that the owner could be deprived of his property by the arbitrary action of an officer proceeding under the pretense of lawful authority. This would be simply to enable one man to transfer the property of another for a purpose not authorized by law, and would not be according to the due course of the law of the land. *McCready vs. Sexton*, 29 Ia. 356. We think, to make a tax-sale valid, the collector should have the power to sell not only for a part but for the whole of the amount he is attempting to collect, and that the excess of interest charged in this case is a question affecting the authority of the officer to make the sale. The language of the statute does not necessarily require a construction which would preclude the owner from raising this question. We hold that it was not intended by the legislature that such construction should be placed upon it."

SECOND POINT.

The Essential or Jurisdictional Steps Provided by Statute Were Not Complied With.

The complaint alleges that the property in question was not advertised for sale and that there was

no proof of publication of notice as required by statute. That this is jurisdictional is shown by Judge Cooley in his note to the text, page 918, (3d Ed.) in his work on Taxation, as follows:

"That the proceedings on which tax-sales depend are to be proved by the records, or by the originals from which the records should be made up, the following cases are authority, if, indeed, any is necessary."

And then cites:

Games vs. Stiles, 14 Pet. 322;
Martin vs. Barbour, 34 Fed. Rep. 701; 140 U. S. 634.

"Where an affidavit of publication of the notice of a tax-sale is required by statute to be filed and preserved, it is the only evidence admissible of the facts required to be stated therein, and cannot be supplemented by parol evidence."

Rustin vs. Merchants, etc., Co., 23 Colo. 351;
Salinger vs. Gunn, 61 Ark. 414;
Martin vs. Allard, 55 Ark. 218;
Coit vs. Wells, 2 Vt. 318.

Sections 4079 and 4080 of the Compiled Laws of New Mexico, 1897, which are still in force, provide as follows:

"Every printer who shall publish such a list and notice shall immediately after the last publication there-

of, transmit to the collector of the proper county an affidavit of such publication, made by any person to whom the fact of such publication shall be known. Such affidavit may be substantially in the following form:

I, A. B., publisher of the ....., a newspaper printed and published in the county of ....., and Territory of New Mexico, on my oath state that the foregoing notice and list were published in said newspaper once in each week for ..... successive weeks, the last of which publication was prior to the..... day of....., A. D. .....

Subscribed and sworn to before me, by the above named A. B., this ..... day of ..... A .D. .....

.....
Seal. C. D.

4080. The collector shall also make, or cause to be made an affidavit of the posting of such list and notice as above required, all of which affidavits shall be deposited by him with the probate clerk, to be there carefully preserved."

This provision of our statute is similar to the provision in the statute of Arkansas, which provides as follows:

"The clerk of the county court shall record said delinquent list and notice of publication attached to it in a book to be kept by him for the purpose and shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication and for what length of time the same was published before the second Monday in April then

next ensuing, and such record so certified shall be evidence of the facts in said list and certificate contained."

In commenting upon the necessity of the tax officers to follow the above provision of the statute, the Supreme Court of the United States in the case of *Martin vs. Barbour*, 140 U. S. 644, states:

"Where the statute provides for the publication of a notice of sale for taxes, and prescribes the terms of such publications, it must be strictly pursued. (Cooley on Taxation, 2nd Ed. 464.) In the present case there was a failure to prove the publication required by the statute. An attempt was made to do so by means of *ex parte* affidavits, presented more than two years after the sale was made, but the statute required record proof, and nothing could be substituted for that, nor could a failure to give it be excused * * * the provision is a peremptory one and it cannot be dispensed with without invalidating the proceedings."

This same case was appealed from the Circuit Court of the Eastern District of Arkansas and is reported in 34 Fed., page 701, and the discussion in the latter case is approved in the opinion above cited in the Supreme Court of the United States. In that case it was provided by statute of Arkansas that no defense could be made to the tax title after a period of two years, and the court held that proof of publication not having been made and the property having been listed for taxation the following year, that the statute

making the tax deed conclusive after two years could not be held valid in such instance.

In other words the sale would be void unless jurisdiction has been obtained by the officer to make the sale and as stated by Judge Caldwell in *Martin vs. Barbour, supra*:

"Until notice prescribed by law has been given, the collector has no authority or jurisdiction to sell; and before he sells, his jurisdiction to do so must be made to appear of record in the mode prescribed by law."

See also, Cooley on Taxation, Vol. I, 3d Ed., pages 518, 519.

As against the general rule that a legislature may validate the proceedings in taxation matters and tax sales which it might have authorized, there is a very noticeable exception which is mentioned in Cooley on Taxation, Vol. I, 3d Ed., at pages 518 and 519, from which we quote as follows:

"The general rule has often been declared that the legislature may validate retrospectively the proceedings which they might have authorized in advance, which are not so far of the essence of the thing to be done that they must be provided for in any statute on the subject, the legislature may retrospectively cure the defect. But there are probably some exceptions to this general rule. If the law has afforded the party an opportunity to be heard, when it might have been dispensed with, he has a right to rely upon this

for his protection, and we should doubt the right of the legislature to take it away by retrospective law. There are some cases, which, we think, recognize this right to a hearing which the law has given, as constituting an exception to the general right of the legislature to cure defects. And the reason of the exception will apply to all cases in which notice to the party, by publication or otherwise, has been provided for his protection. If this can be dispensed with by a healing act, the very provision for a notice for the party's protection becomes a trap for his destruction."

TREATING OF THE SECOND ASSIGNMENT OF ERROR.

Second: The court erred in sustaining the demurrer to the complaint as shown by the first ground set out in said demurrer in paragraph one.

The first cause of action in the complaint is well stated under the provisions of Article XVI of Chapter 107 of the Legislative Acts of New Mexico of 1907, which is as follows:

"Sub-sec. 273. An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto.

Sub-sec. 274. The plaintiff must file his complaint in the district court, setting forth the nature and extent of his estate and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred

and forever estopped from having or claiming any right or title to the premises, adverse to the plaintiff, and plaintiff's title thereto be forever quieted and set at rest. Any or all persons whom the plaintiff alleges in his complaint he is informed and believes make claim adverse to the estate of plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his complaint in his lifetime made claim adverse to the estate of plaintiff, and all unknown persons who may claim any interest or title adverse to plaintiff, may be parties defendant to said complaint by their names, as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased persons and said unknown persons who may claim any interest or title adverse to the plaintiff by the name and style of unknown claimants of interests in the premises adverse to the plaintiff, and service of process on and notice of said suit against such defendants shall be made as in other cases in conformity with the provisions of this Code.

Sub-sec. 275. If the defendants, or any of them, shall appear and disclaim all right and title adverse to the plaintiff, he shall recover his costs, and in all other cases the costs shall be in the discretion of the court. If the defendant, or any one of them fails to appear and answer, the court may render decree against such defendant so failing to appear in accordance with the prayer of the bill of complaint, or such other decree in the premises as to the court shall appear meet and proper.

Sub-sec. 276. The action contemplated by this Article shall be conducted as other actions, by equitable proceedings under the rules of chancery."

Under this cause of action appellant could have shown that the Horseshoe Land and Cattle Company

offered and tendered payment of the taxes on the land in question but the same was refused for the reason that said company refused to pay a tax on personal property in the County of Quay. "An offer to pay is equivalent to payment." *Poindexter vs. Greenhow*, 114 U. S. 270.

It has been held that a statement of a cause of action under the provisions of a statute similar to the above entitles the plaintiffs to equitable relief and is good on demurrer.

Ely vs. New Mexico, etc., Ry. Co., 129 U. S. p. 291.

TREATING OF THE THIRD ASSIGNMENT OF ERROR.

Third. The court erred in holding and deciding that the words "sold at tax sale in accordance with this act," as found in Section 25 of Chapter 22, Laws of New Mexico, 1899, did not mean that the mandatory provisions of said act were to be followed, but meant no more than a reference to sales under said act as distinguished from sales under some other act.

The phraseology of that portion of Section 25, in question here is: "And no bill of review of other action attacking the title to any property sold at tax sale *in accordance with this act* shall be entertained," etc.

It is contended by appellant that the words, "in

accordance with this act" intend that the substantial requirements as to notice, etc., must be complied with. In other words to a reasonable degree the steps provided by the act must be taken. On the other hand the appellee will contend that the words "in accordance with this act" intend to distinguish a sale under that act from some other act. A complete answer to this is that insofar as the tax that might be affected by "this act" there *is* no other act under which such a tax sale could be made. The Standard dictionary defines the words "accordance:" "The state of being in accord, or the act of according, agreeing, or granting; concord; agreement; conformity; harmony." It is synonomous with the words "conformity" and "harmony;" substituting the synonyms for the word, the meaning that we contend for is plain.

TREATING OF THE FOURTH ASSIGNMENT OF ERROR.

Fourth. The court has erred in holding and deciding that the allegation in paragraph 2e of the complaint, "that the sum alleged to be due against said land for taxes for the year 1904 and for which the land was attempted to be sold was $4.02; whereas the sum levied and assessed against the said land was in fact $3.78," meant that there were costs sufficient to cover the difference and in so holding, considered this fact proven by statement of counsel, the matter before the court being a demurrer.

When it is considered that the Supreme Court of

New Mexico was reviewing the action of the district court in sustaining a demurrer where the facts are admitted the holding of said Supreme Court, (Tr. p. 21) that the difference existing in the amount for which the lands were advertised to be sold, and sold, and the amount that was actually levied and assessed, "*would* be covered by the interest and expenses of sale, which the law permits" was clearly erroneous. This was a question of fact and not one for the court to find as a fact on demurrer.

Our contention in this case is, that even should the court hold that the provisions of Section 25 of Chapter 22 of the Laws of 1899, restrict the grounds on which a tax deed may be attacked, to the two questions of "that the taxes, penalties, interest and costs had been paid before the sale, or, that the property was not subject to taxation," the complaint in pleading facts and not conclusions, shows on the face thereof, that the property was sold for a tax not even levied or assessed against it and therefore for a tax to which the property was not subject.

It is distinctly alleged in the answer and counterclaim of A. Straus, the appellant, that the alleged sale for taxes which was made for the year 1904, was for an amount of delinquency alleged to be due against the said land for such taxes, in the sum of $4.02, whereas the sum levied and assessed against the said

land was $3.78. Here is an express amount of 24 cents for which the land was sold for *alleged taxes*, for which this property was not subject according to the allegations of said answer, which by the demurrer, must be taken to be true. It is true that it is not alleged in terms in said answer, that the land was not subject to the tax or assessment, but that would be a statement of conclusion, and would be improper pleading. In the answer herein, it is attempted to state facts and not conclusions. Therefore, if the appellant is in error in every other point for which he has contended, he was within the very terms of the statute in this particular.

Where property is sold for more than is due, whether the excess is due to an illegal levy or illegal penalties and costs, the officer has no jurisdiction to sell, and it is void, notwithstanding, curative statutes.

Lufkin vs. City of Galveston, 11 S. W. Rep. 340;
Treadwell vs. Patterson, 51 Cal. 637;
Huse vs. Merrim, 2 Greenl. 375;
Case vs. Dean, 16 Mich. 12;
Eustis vs. Henrietta, 91 Tex. 325, 43 S. W. 259;
Alexander vs. Gordon, 101 Fed. 91;
Ensign vs. Barse, 107 N. Y. 329;
Harper vs. Rowe, 53 Cal. 233;
Warden vs. Brown, (Cal.) 98 Pac. 252;
Dewoe vs. Cornell, 10 N. D. 123, 86 N. W. 227.

In the case of *Lufkin vs. City of Galveston*, 11 S. W. Rep. 340, the court said:

"In this case the excess of interest charged is approximately 70 cents, and it is insisted by counsel for appellee that the *maxim de minimis* should apply. But upon a question of excessive taxation it is held expressly that the maxim does not apply. *Treadwell vs. Patterson*, 51 Cal. 637. It is said in the cases cited that 'the rule established by the authorities is, that if the excess be as much as the smallest fractional coin authorized by law, the sale is void.' See also, *Huse vs. Merrim*, 2 Greenl. 375; *Case vs. Dean*, 16 Mich. 12. There is reason for the rule. It is to the interest of the public that illegal taxes should be so declared; and so trivial sum exacted of each tax-payer becomes a matter of importance as applied to the body of tax-payers at large, and may become important in amount to each individual owner of property by reason of the continued exactions of successive years."

TREATING OF THE FIFTH ASSIGNMENT OF ERROR.

Fifth. The court erred in holding and deciding that the provisions of Section 31 of Chapter 22 of the Laws of New Mexico of 1899, as to the date of sale are not mandatory, and that a certificate of sale attempted to be made under said section, though none of the provisions thereof was followed, has the same force and effect as certificates issued in sales on judgments and executions.

Section 31 of Chapter 22 of the Laws of New Mexico for 1899, reads as follows:

"Sec. 31. In all cases where the delinquent taxes

due amount to less than twenty-five dollars, it shall not be neccessary (necessary) for a collector to include in the publication hereinbefore provided, the notice for application to the district clerk for judgment, but it shall be the duty of the said collector upon such taxes becoming delinquent on the second day of January of each year, to advertise the property on which taxes are levied in some newspaper of general circulation as hereinbefore provided to be sold on the first Monday of May thereafter in the manner hereinbefore provided and upon all taxes becoming due and delinquent on the second day of July of each year, the property on which tax is levied shall be advertised to be sold in the same manner on the first Monday of November thereafter. The collector shall issue to any purchases (purchaser) *under the provisions of this section* a certificate of sale in the same manner as hereinbefore provided for the issuance of certificate and the said certificate shall have the same force and effect as certificates issued in sales on judgments or executions hereunder (.) The collector may continue the sale of property hereunder from day to day not to exceed sixty days, until all of said property has been disposed of. But this section shall not relieve the collector of the duty of collecting the taxes by distraint and sale of personal property as provided in Section (s) 4062, 4063, 4064 and 4065 of the Compiled Laws of 1897."

Appellee, at the hearing in the court below, assumed that a tax title based upon a tax certificate, where the sale is for a less amount than $25.00, and on which no judgment has been rendered, has the same solemnity as a tax title based upon judgment for amounts above $25.00, and stated:

"The statute goes on by Section 16, to provide that

if by neglect the officer for any other good reason or good cause real estate cannot be duly advertised and offered for sale within the time prescribed in this act, advertisement for sale may be made and had at any other time."

This is a very critical point for appellee, and perhaps for this reason, appellee may be excused for attempting to read into the law something that is not there. Section 16 is as follows:

"Sec. 16. If by neglect of the officer to make returns or from any other good cause real estate can not be duly advertised and offered for sale within the time prescribed in this act, such advertisement and sale may be made and had at any other time; and the officer so advertising shall set out in the advertisement the reasons for such delay."

and applies only to advertisements made as process to bring parties into court to answer the complaint on a tax suit, and in default of answer to such process, judgment may be taken, and does *not* refer to the sale of lands for delinquent taxes, and especially does not refer to the sale of land where the delinquent tax is less than the sum of $25.00. The sale of land where the delinquent taxes are less than $25.00, is especially provided for in Section 31, above set out.

It will be seen that the exact day of sale is fixed under this section; that is to say, the taxes that are delinquent on the second day of January of each year,

are to be collected by the sale of the property upon which such taxes are due, which sale shall be the first Monday of May thereafter, and the property upon which delinquent taxes are due on the second day of July must be advertised and sold on the first Monday of November thereafter; a provision being made that the collector may continue the sale of such property from *day to day not to exceed sixty days* until all the property has been disposed of, and a reference to Section 22 of said Chapter indicates plainly what must be done at the end of sixty days, to-wit: that the property must be struck off to the county as a purchaser if there is no other purchaser in good faith bidding upon the same. Now, these provisions of the said Section 31 of Chapter 22 are mandatory. There is no discretion in the collector to advertise otherwise, or to continue the sale for a greater period than sixty days, and the importance of these provisions of the law become apparent when we refer to the answer and cross-complaint and find from the facts therein stated that the property in question was not sold either on the first Monday of May or the first Monday of November next succeeding the second day of January and the second day of July respectively, for it is alleged in said answer and cross-complaint that the taxes for which this property was attempted to be sold, were taxes due in the year 1904, and that the sale took place on the fifth day of March, 1906. A statement of fact, and not a conclusion, which renders any tax

certificate or tax deed which upon its face shows the date at which the tax became delinquent and the date on which the sale was made so contrary to the mandatory terms of this statute, to be absolutely void, and no curative statute could render it otherwise.

In the case of *Redfield vs. Parks, infra*, it was held that a deed of land sold for non-payment of taxes which discloses that the sale was made on a day which was not the day authorized by law, is void on its face, and is not admissible in evidence to support an adverse possession under the statute of limitations.

Redfield vs. Parks, 132 U. S. 239;
Coulton vs. Stafford, 56 Fed. 569.

Illustrative of the principle that a curative statute does not aid a tax deed or certificate which on the face thereof shows a violation or non-compliance with the statute relative to sale, are the cases which hold that notwithstanding the curative statute where the certificate or deeds show upon their face that the county was a competitive bidder, or that the property was struck off to the county on a day when it was not authorized to purchase it contrary to the statute are void.

Rickett vs. Knight, 16 S. D. 395, 92 N. W. 1077;
Rush vs. Lewis & Clark Co., (Mont.) 95 Pac. 836;

Hannerkratt vs. Hamil, 10 Okla. 219, 61 Pac. 1050;
Magill vs. Martin, 14 Kans. 7;
Dyke vs. Whyte, 17 Colo. 296, 29 Pac. 128.

Section 23 of Chapter 22 of the Laws of 1899 provides that the tax certificate shall state the amount for which the land was sold, and the year or years for which the taxes were assessed, the amount of interest, penalties and costs, the date of sale, etc. If this should be stated in the tax certificate in this case, such certificate would upon its face show that the sale was void having been made at a time not authorized by the statute.

We respectfully submit that the judgment of the Supreme Court of New Mexico, affirming the judgment of the district court, should be reversed, and judgment entered for the appellant, plaintiff below.

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